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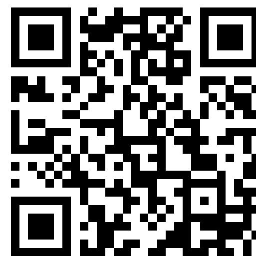

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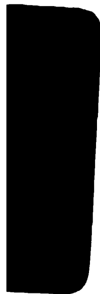

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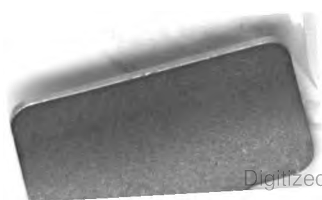

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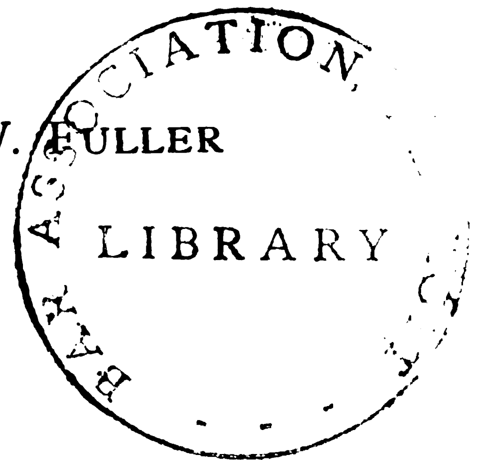
THE

GREEN BAG

An Entertaining Magazine for Lawyers

EDITED BY HORACE W. FULLER



VOLUME VIII.

COVERING THE YEAR

1896

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RUFUS W. PECKHAM.

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The Green Bag.

Vol. VIII. No. 1. BOSTON. January, 1896.

THE NEW SUPREME COURT JUSTICE.

"Promotion cometh neither from the east, nor from the west, nor yet from the south." — Psalm lxxv.

By A. Oakey Hall.

RUFUS WHEELER PECKHAM, when early in the New Year he arrives at Washington to put on the gown of a Judge of the highest Court in the Union, will doubtless recall that his honorable visit was not the first that he had made to the national capital. His first arrival there was when as a very juvenile — perhaps as *l'enfant terrible* — he came with his father, whose full namesake he is, at the time when the sire took his seat as member of Congress from the district in which the capital of New York State is situated. Rufus Wheeler Peckham, senior, was, as his son became, a native of Albany County; and was bred to the law, in which profession he became highly successful; and after his Congressional term ended he was elected as a justice of the Supreme Court: and also in 1870 a judge of the Court of Appeals.

Judicially the new justice of the United States Supreme Court precisely followed in his father's footsteps, for after succeeding to his father's practice he also became first a justice of the Supreme Court, and next by election in 1886, a judge of the Court of Appeals. Following precedents set by New York predecessors who had become Washington justices — Smith Thompson (from 1823 to 1843), Samuel Nelson (from 1845 to 1872), and Ward Hunt (from 1872 to 1882), the new justice has gone from the highest State bench to the highest Federal court.

The Bar of Albany has always contained representatives of equal eminence with any others in the cities of this country. And when Peckham, the elder, was a young lawyer, he had as compeers such great lawyers as Martin Van Buren, Benjamin F. Butler — an attorney-general of the United States — James Vanderpoel and Samuel Stevens; with the additional value of professional acquaintance with all the eminent counselors of his day who from all parts of the Empire State visited Albany from time to time, there to argue important appellate controversies. Equally, the son, as student and practitioner, enjoyed similar advantages.

The elder Peckham was notable for being a lawyer who was thoroughly grounded in the foundation principles of legal science, before he came to study the reports; and eventually as judge to aid in constructing them. What more natural and proper therefore that the son as his father's student should likewise imbue himself with those foundation principles, and in all respects accept his sire as his professional model? The latter passed ten years upon the Supreme Court bench, but only three upon that of the Appeals: for in November, 1873, voyaging abroad for his health, he became one of the passenger victims of the ill-starred steamship Ville du Havre. He was by death prevented from feeling paternal pride in beholding his son a few years later succeeding him by election on the Supreme bench; or by an after election, in November, 1886, filling the very chair which his own death vacated in the Court of Appeals.

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As the second Judge Peckham occupied that very chair, its former occupant from a canvas on the court room walls seemed ever to look fondly upon his successor son. And no one entering the place and simultaneously viewing the painting and the new Peckham on the bench could fail to observe that the latter was to a notable extent a physical replica of the father, as every veteran lawyer who pleaded in the court room recognized that the son was also intellectually a replica. The example of heredity in the matter has long been a topic of Bar comment.

When the son first appeared on the Supreme bench, lawyers before him seemed to feel that in recalling the sire they needed no introduction to the new incumbent; and the initials R. W. P. signed to an order or record entry as in former times seemed pleasurably familiar. But as one of thirty-two Supreme Court Justices, Judge Peckham the second did not attract such marked attention as followed him when he became one of seven. And when he leaves Albany for Washington only one of that original seven will be left — Chief Justice Andrews, who sits by virtue of that rarity of American politics, a unanimous election.

Judge Peckham's first opinion of course attracted much attention from Bench and Bar, and even from lay readers, — for during the campaign which led to his nomination and election he had been, in the columns of the "New York Tribune," which politically opposed his candidacy, criticised with all the well-known and traditional pungency of its editorial comment. This was based upon an opinion infected with a political taint he had pronounced during a railway controversy. That first opinion is in 104 New York Reports, in a case known as Becker *v.* Koch, and which raised the always interesting topic how and to what extent can a party's own witness be open to impeachment. Judge Peckham in reversing — *per curiam* — gave an opinion which may always be referred to as a quasi treatise on the question. The opinion, like every other opinion of his to be thereafter copiously found in all the subsequent New York reports, was discovered to be couched in the good old Anglo-Saxon of Addison's day, to be of pure logical construction, and written with more care than were his opinions in the court below. Judge Peckham seems to take an *a priori* pleasure in a reversal, and his opinions toward that direction seem to have more vim than when he sustains.

I recall that, sitting not long ago in the court-room while an argument was proceeding, I overheard the attorneys who sat beside the arguing counsel whisper, "Address Peckham particularly: he is shaking his head"; and I recognized that the attorney was fearing the reversal propensities of that listening judge.

Another notable opinion on the doctrine of user of thoroughfare followed, in Avery *v.* Central Railway (106 N. Y.), which, taken with another about taxation of eleemosynary institutions, in Colored Orphan Asylum *v.* The Mayor of New York (104 N. Y.), or soon afterwards (108 N. Y.) with People *v.* Richards, as to whether burglary could be predicated of breaking and entering into a cemetery-tomb: all showed that he was a jurist of versatility and answered the description implied in witty Judge Martin Grover's well-known remark, "I like a good all around lawyer; but not if he is so all around as to argue only in a circle."

Another opinion rendered while his judicial appellate sword was still a maiden one, which attracted the attention of the legal fraternity and of newspapers, was in Harnickell *v.* The New York Life Insurance Company (111 N. Y.), where he reversed a case argued by W. B. Hornblower, whose rejection several years later opened his own way to the Supreme bench. (*En passant*, his brotherly affection, however, for Wheeler H. Peckham, whose rejection further opened that pathway, would not give him pleasure.)

An opinion in the famous Bull will case, argued pro and contra by such distinguished

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advocates as Joseph H. Choate and John E. Parsons, is really a treatise upon the law of undue influence affecting testament-making; and it became further notable. And the like may be said of his opinion to be found in 145 N. Y. (N. Y. Health Department *v.* Trinity Church Corporation), in which he most earnestly discussed how far regulation of a merely police nature could disturb rights of the possession and uses of realty. The case had excited much popular attention, because there had been a newspaper trial of it, and editors had summed up rather unkindly against the alleged greed of a wealthy church congregation. That charge was, however, eloquently parried by Stephen P. Nash, who in the annals of the Episcopal Church became the successor of Murray Hoffman as the emeritus counsel in Canon law. That case will always be found valuable to the members of the profession who desire to examine the extent or limitations of those police regulations which affect the possession and enjoyment of realty. In the same volume appeared another opinion of Judge Peckham in a case where there had been a preliminary newspaper trial, which is more frequent — and indeed audacious — in New York City than in all the other cities of the Union and Great Britain together. The question considered was the reinstatement of a policeman after apparent procedure of dismissal by his superiors.

In yet another notoriously tried newspaper case — Kennedy *v.* The (much abused) Elevated Railway, he rendered a notable opinion involving the law of injury to easements of air and light.

His judicial associates seemed to ever take pleasure in calling on his pen for opinions in much litigated popular legal conflicts. For, in framing the consultation views of those associates and of himself, he displayed tact in expression, along with his logical considerations.

I once heard a client observe: "The other judges did not treat me fairly; but, although Peckham beat me, his views seemed as caressing as is the fault-finding of a loving and tender-hearted woman." And yet when the demerits of a considered case were to be aggressively considered, Judge Peckham was equal to administering a paternal drubbing.

In preparing this paper, I passed several delightful hours turning the leaves of the forty-six volumes of New York reports, which contain his opinions, as scattered through them.

But perhaps the most originally conceived, and best treated opinion will be found in a forthcoming volume. This was delivered only a fortnight before his nomination to his new judicial duty. It will become known as Schuyler *v.* Curtis. Some ladies of a patriotic association had conceived the idea of publicly erecting two statues — one to a representative woman philanthropist, and another to a representative woman reformer. As subject for the former, they selected a deceased associate, Mrs. Mary Hamilton Schuyler; and for the latter subject, a lady much noted in newspaper history, and about whose deserts of fame opinions widely differed. A relative of the late Mrs. Schuyler applied for an injunction to restrain the feminine association from erecting a statue to her, basing opposition upon her well known, while living, indisposition to publicity, and partly upon the proposed public association of her memory with that of the other lady.

Judge Peckham, in denying — *per curiam* — the injunction, most learnedly and interestingly, even to a layman reader, discussed what he felicitously termed "the right of privacy." The Court denied the injunction on the jurisdictional ground that this right of privacy had expired with Mrs. Schuyler's death — following the analogy of a tort — and did not enter into the domains of *coram judice*, by even intimating what her own remedy might have been, had she survived to personally consider the taste or

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propriety of the alleged complimentary action.

In comparing the verbiage and reasoning of this later opinion of Judge Peckham, with his earliest one delivered in the Court of Appeals as before referred to, I fail to perceive either a gain or a loss of excellence. His style throughout the reports display evenness; an attribute which reviewers long ago awarded to all the volumes of Macaulay.

From scope of learning Judge Peckham seems admirably adapted to become a justice of the high Federal Court, to the forum of which come controversies of wonderfully varied character, and which often raise questions of extreme acuteness. "He spoke all the languages of jurisprudence," said the late Henry J. Raymond, one of the founders of the New York Times, when pronouncing a eulogy of Daniel Webster. That remark may be applied to Judge Peckham. And how many of those languages must enter into the reflections of the justices of the United States Supreme Court. Is there not one language of international law, of constitutional law, of prize and admiralty, of copyright, of the statutes — a patois, so to speak, to each State — of equity and of common law?

Judge Peckham carries to Washington family prestige, judicial prestige, social prestige, and that kind of character-prestige which has always lucidly shone in the Supreme Court, from the days of Jay, Rutledge, Ellsworth, Marshall, Taney and Chase, to these later days of Waite and Fuller.

The social life of Albany will lose, and that of Washington will yet gain, by the departure of the new Judge from the capitol of the Empire State, and by his New Year's advent into the National Capitol.

During the week before Christmas, his associates gave him a farewell dinner in the famous Oranje Boven club-house, under the shadows both of his family home and of the court-rooms of his career. There was a memorable leave-taking, and a mingling of sadness with felicitations upon his advancement.

"If only John Adams could have survived two years longer to witness with pride the inauguration of his son as second president of the name," was an exclamation from an historian. I might paraphrase it to read — as remembering the kindly face and genial tone of Rufus Wheeler Peckham the first — "if only he could have survived to witness with pride, in his green old age — himself constitutionally retired from the bench — the inauguration of his son as justice of the court in that capitol building where he had once directed the infant footsteps of the latter through the Congressional corridors which led towards the most powerful and dignified court in Christendom.

THE WILL OF A GREAT LAWYER.

HOW CHIEF-JUSTICE MARSHALL DEVISED HIS ESTATE.

By Sallie E. Marshall Hardy.

On file in Richmond, Va., is the paper which devised and divided the large estate, consisting chiefly of land of "the great Chief Justice," as he is commonly called.

Included in it is some of the land which is known in song and story as "Greenway Court," the forest home of Lord Fairfax, that George Washington surveyed and where he was frequently a guest. The Chief Justice bought part of this land, the rest he received as a fee for arranging the dispute between the State of Virginia and Lord Fairfax's heir, Dr. Fairfax of England, who,

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it was claimed, was an "alien enemy during the Revolutionary War, and therefore had forfeited his inheritance."

The will was probated in Richmond, July, 1835, at a general court held at the capital. It is in the Chief Justice's handwriting. It is dated the ninth of April, 1832, and has five codicils, dated August 13, 1832; 29th of March, 1834; July 3, 1834; Nov. 6, 1834, and July 3, 1835, the last having been written a few days before his death. At the end of each codicil is, "This codicil was wholly written by myself.—J. MARSHALL."

The will begins: "I, John Marshall, do make this my last will and testament, entirely in my own hand-writing, this ninth day of April, 1832. I owe nothing on my own account." He then arranges for the management of an estate he held in trust, and for the settlement of a suit for some property he had purchased and some paper he was on as surety for a friend.

It is an interesting fact that the suit he mentions, so great is "the law's delay," was not settled until forty years after his death, and his heirs were so many by that time that each received only eleven dollars as his or her share of several thousands.

He divides his estate equally between his only daughter and his five sons, his wife having died several years before.

He leaves his daughter's share in trust, saying: "I have long thought that the provision intended by a parent for a daughter ought, in common prudence, to be secured to herself and children, so as to protect her and them from distress, whatever casualties may happen. Under this impression, without derogating from the esteem and affection I feel for my son-in-law, I give to my nephew, Thomas M. Ambler, in trust, to apply the annual profits to the maintenance of my daughter and her family and for the education of her children, for her and their separate use, not to be subject to the control of her husband or to the payment of his debts."

He recommends that his son-in-law be employed as agent to manage his daughter's estate, and if his son-in-law survive his daughter, one half of the annual profits of the property bequeathed in trust for his daughter and her family, be paid to him for his own use.

His love for his wife is a matter of history and has been dwelt upon in every biography of him; it was truly "the ruling passion of his life," and although she had been dead several years, he remembered her every wish. At her request he gives to one of her friends the dividends on ten bank-shares during life, "as a token of my wife's gratitude for long and valuable attentions," and he says: "My beloved wife requested me while living to hold in trust for our daughter one hundred bank-shares, to pay the dividends to her during my life and to secure the same to her and her children when Providence should call me, also, from this world. In compliance with the wish of her whose sainted spirit has fled from the sufferings inflicted on her in this life, I give," etc.

"My daughter will never forget that this is the gift of the best and most affectionate of mothers." In his will was enclosed for each of his children a beautiful eulogy of his wife, which he had written on the first anniversary of her death. He gives to each of his grandsons named John, one thousand acres of land, and adds, "if at the time of my death either of my sons should have no son named John, then I give the land to any son he may have named Thomas in token of my love for my father and veneraion for his memory. If there shall be no son, named John or Thomas, then I give the land to the eldest sons, and if no sons to the daughters."

He says: "I had heretofore appointed my sons and son-in-law as executors of my last will. In the apprehension that the appointments of so many executors may produce some confusion in the management of

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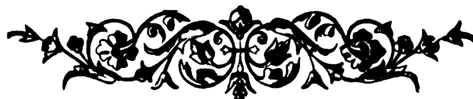
my affairs, I have changed my purpose and have determined to select one of my sons who may be sufficiently active to attend completely to the business. I therefore appoint my son, James Keith Marshall, to be my sole executor, directing that no surety shall be required from him, and allowing him $1000 for his care and pains. I hereby revoke all former and other wills and declare this to be my last will, written in my hand, on two sheets of paper, this ninth day of April, one thousand eight hundred and thirty-two.— J. MARSHALL."

The Chief Justice owned a number of slaves, and two of them, especially, were notable characters, his coachman, and Robin, his factotum and what was called in those days body-servant. Their manners were a curious mixture of deference and self-importance. Robin was almost as well known in Richmond as his master; finer manners or more faultless deportment could hardly be presented by the most educated and refined gentleman than characterized his bearing on all occasions. When walking the streets he was always dressed in a handsome suit of black, the coat with a large buff collar and cuffs, white vest and cravat, pants buttoned at the knee, and large silver buckles on highly polished shoes finished his costume. With manners so polished as to attract the attention of strangers, some of whom have been known to return his graceful salutation and stop to inquire the name of his master, when Robin, beaming with pride and satisfaction, would answer, "Judge Marshall, sir, the Chief Justice of these United States."

A niece of Judge Marshall's who spent much time at his house, told me Robin worried the young ladies who happened to be staying there considerably by dismissing their beaux every day at dinner-time. Dinner was at half-past four. Regularly as the clock struck four, Robin would appear. "Ladies," he would say, "the Judge has come from court and gone to his room to prepare for dinner. Gentlemen, we have arranged places for you, and will be very glad if you will remain; dinner will be served in half an hour." Then he would throw open the door, and bold indeed would be the young man who could remain in the face of such a hint and detain the young ladies. The girls assured "Uncle Robin" they could hear the dressing-bell, but the same thing was repeated every day.

The Chief Justice makes provision for Robin in the first codicil to his will, in these words: "It is my wish to emancipate my faithful servant, Robin, and I direct his emancipation if he *chuses* to conform to the laws on that subject requiring that he should leave the state, or if permission can be obtained for his continuing to reside in it. In the event of his going to Liberia, I give him one hundred dollars; if he does not go thither I give him fifty dollars. Should it be impracticable to liberate him consistently with law and his own inclination, I desire that he may chuse his master among my sons, or if he prefer my daughter, he may be held for her and her family as is the other property bequeathed in trust for her, and that he may always be treated as a faithful, meritorious servant.— J. MARSHALL."



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THE INDIAN WIFE.

By R. Vashon Rogers.

MARRIAGE forms the substratum of the whole civil life of the Hindu. It is to him above all things a religous ceremony, not "enterprised, nor taken in hand unadvisedly, lightly or wantonly," but entered into for religious objects and ends, considering that it affects his spiritual state both here and hereafter. A son is necessary, indispensably necessary, for he is the one who has to perform the religious funeral rites, and pay the debts, both spiritual and temporal, of his ancestor. Manu — an old and venerable sage who lived either 1280 B. C., or 400 A. D., or somewhere between (no one knoweth exactly), and wrote in verse — says, "By a son, a man gains heaven; by the son of a son he obtains immortality; by the son of a son of a son, he rises to dwell in the sun." If a man has no son he is excluded from the celestial abodes. A daughter is quite a secondary consideration, though useful in default of a male heir.

Nowhere are the laws, rules and regulations, anent woman, courtship and matrimony, *et hoc genus omne*, so numerous, explicit and imperative as in the writings of the learned pundits who have been the lawgivers and law expounders of India.

Matrimony is compulsory among the Hindus. We mean not that a man is sacrificed upon the hymeneal altar whether he will or whether he won't, but that public opinion is so strong and the customs and usages of society, in all its grades, are so akin to the laws of the Medes and Persians in their cast-ironness, that marriage is inevitable. It is wedlock, or extinction socially. The man marries, if for no other cause, for the reason that (according to Mr. Froude) King Henry VIII married so often, that he may have an heir; the girl is married because she is too weak to stand upright alone, and must ever be watched. "A woman ought never to have her own way"; "A little girl, a young woman and an old woman ought never to do anything of their own will, even in their own house"; "If a woman is not guarded, she would bring misfortunes on two families," says our friend Manu. "Day and night must women be held by their protectors in a state of dependence; a woman is never fit for independence," remarked another sage; and the learned pundit to whom we are indebted for the Gentoo laws says, "So long as a woman remains unmarried her father shall take care of her, and so long as a wife remains young her husband shall take care of her; and in her old age her son shall take care of her; and if, before a woman's marriage, her father should die, the brother or the brother's son, or such other near relations of the father shall take care of her; if after marriage her husband should die, and the wife has not brought forth a son, the brothers and brothers' sons, and such other near relations of her husband shall take care of her. If there are no brothers, brothers' sons, or such other near relation of the husband, the brothers or brothers' sons of her father shall take care of her; if there are none of those the magistrate shall take care of her; and in every stage of life, if the persons who have been allotted to take care of a woman do not take care of her, each in his respective stage accordingly, the magistrate shall fine them."

The African bridegroom who interrupted the officiating parson after the words "love, honor and obey," by the remark, "Read that agin, sah; read it once mo', so's de lady kin ketch de full solemnity of de mean-

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ing. I'se been married befo'," was thoroughly imbued with the spirit of Eastern legislation.

The Hindu woman's name being Frailty, she was married young; and being Folly, she seldom had the trouble of choosing for herself. Any time between the age of two and maturity she was given in marriage, perchance to an infant like herself, or perhaps to a gray-haired Brahmin. A wise man in the days of Akber thought it not commendable for the bride to be younger than eight or older than ten. One old writer says that the man who gives a girl in marriage after she arrives at maturity, and the man who takes such a damsel, sinks to the region of torment; and the father, paternal grandfather and great grandfather of each shall be born again in dirt. The contract made in infancy constituted a perfect marriage, although of course consummation was postponed until a proper age, and conferred upon the luckless girl all a wife's rights and all a widow's obligations, did her husband pass out of this life while she was growing up. If a father was so neglectful as not to select a suitable husband for his daughter, then he lost all authority over her, and the duty of finding her a partner devolved in succession on the paternal relatives, the grandfather, the brother, the uncle, the cousin, and failing these, on the mother. If no choice had been made by the time she had reached the mature age of eleven years, then the young lady could make her own selection. And this seems to be even now the law in the land lying between India's coral strand and the snow-capped Himalayas. (Code of Manu, Grady's Manual of Hindu Law, ch. 1: Ayeen Akbery, vol. II, page 551; Colebrooke's Hindu Law, vol. II, p. 377.)

The adviser of the Emperor Akber (the greatest and wisest of the Mogul emperors, who died in 1605) considered that twenty-five was the proper age for a man to perpetrate wedlock and that it was folly to marry after fifty. Manu declares it to be a father's duty to give his daughter in marriage to a young man of agreeable appearance and of the same rank as the maiden. A younger brother was not allowed to marry before his elder. If he did he went to hell.

Full details are given in the law-books of India as to the kind of wife a man should select; what women and what families he should avoid in making his choice. He should shun families that, in modern parlance, do not go to church, nor read the Bible; those where all the olive-branches are of feminine gender, and those over whom phthisis or dyspepsia reigns. Girls whose hair suggests the old saying anent a white horse; those whose locks are like Bill Nye's or the celebrated Sutherland sisters'; and girls who strive to solve the problem of perpetual motion with their tongues, are not to be thought of; nor are those to whom their parents were foolish enough to give names of snakes, rivers, trees, constellations or barbarian nations. When he finds one of his own class in whose form is no defect; whose name, like the Italian language, melts like kisses on a lady's lip, who walks gracefully and whose body is of exquisite softness, such a one he can wisely wed. (To this we even in this last decade of the nineteenth century say Amen.) According to Akber's learned men, the ideal woman is the virtuous wife who loves her husband; she is so modest that no man can ever see her looking at him; she never laughs loudly, nor smiles so as to show her teeth; she seldom speaks, and when she does it is always in a low tone; is never in a passion, and never goes out of doors, even if she has the opportunity (which, by the way, her good man seldom offers her). In passing we may say that the Hindu pedants recognized three kinds of laughter: (1) *smit*, when there is a slight alteration in the cheeks, eyes and lips. (2) *Wehrut*, where the cachinnation is so great that the mouth opens; and (3) *Aphust*,

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a horse-laugh. Another classifies the fair sex as follows: *Pudmininee,* the incomparable beauty, with a good disposition: she is tall and well proportioned; her voice is as melodious as a silver bell; her breath is as the perfume of a rose; she is chaste and obedient to her husband. Next comes, in the diminuendo scale, *Chittrunnee,* who is somewhat inferior to the former in beauty of face; her figure is neither fat nor lean; she rejoices in a small waist and full bust. *Sunktnee,* is fat and short, with violent temper, and her quarrellings and wranglings with her husband are constant. At the bottom is *Hestenee,* who is even worse in appearance, temper and disposition than *Sunktnee.* (Manu, ch. 11, s. s. 7–10; Ayeen Akbery, Vol. 11, page 470–481).

The lawyers of Hindustan had strong opinions anent the dispositions of the average woman. One, after mature reflection, writes: "Women have six qualities, the first, an inordinate desire for jewels and fine furniture, handsome clothes and nice victuals; the second, inordinate lust; the third, violent anger; the fourth, deep resentment, i. e., no person knows the sentiments concealed in their hearts; fifth, another person's good appears evil in their eyes; the sixth, they commit bad actions. A woman's passion is never satisfied, no more than fire is satisfied with burning fuel, or the main ocean with receiving the rivers, or the empire of Death with the dying of men and animals; in this case therefore a woman is not to be relied on. If a wife have her own free will, notwithstanding she be sprung from a superior caste, she will yet behave amiss." (Gentoo Laws, pages 282–283.) In the Mahabharata it is written, "Final destiny, wind, death, the infernal regions, the rage of the ocean, the edge of a razor, poison, venomous serpents, and devouring fire, all united are no worse than women."

This is well nigh equal to St. Chrysostom's opinion, which was that woman is a necessary evil, a natural temptation, a desirable calamity, a domestic peril, a deadly fascination and a painted ill. Or to the summary of the poet: —

> Mincers of each other's fame,
> Full of weak poison:
> But fit to flaunt, to dress, to dance, to thrum,
> To tramp, to scream, to burnish and to scour,
> Forever slaves at home and fools abroad.

Among the Siamese it is a sin for a priest to speak to a woman in a secret place, or for him to receive anything from a feminine hand. (Siam, by Sir J. Bowring, page 328.)

Even in the old days in India, husbands went off on journeys, at times for one reason, at times for another. The law for the husband in such an event was that, before "going, he must give his wife enough to furnish her with victuals and clothes, until the promised period of his return: if he goes without leaving such provision, and his wife is reduced to great necessity for want of such conveniences, then, even if she be naturally well principled, she yet becomes unchaste, for want of said victuals and clothes." But the law, although evidently fearing the effect of hunger and nakedness on the poor woman, did not approve of her giving way to temptation even under such circumstances; it said in no uncertain words, "when a woman whose husband is absent on a journey has expended all the money that he gave her, to support her in victuals and clothes during his absence, or if her husband went on a journey without leaving anything with her to support her expenses, she shall support herself by painting, by spinning, or some other such employment." The right of the woman to paddle her own canoe, when her husband did not do so, was even recognized by these wise men of the East. The freedom and delights of the modern grass-widow were not thought of then; the law was explicit as to what the stay-at-home wife was not to do. "If a man goes on a journey, his wife shall not divert herself by play, nor shall she see any public show, nor shall she laugh, nor shall she

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dress herself in jewels and fine clothes, nor shall she see dancing, nor hear music, nor shall she sit in the window, nor shall she ride out, nor shall she behold anything choice or rare; but she shall fasten well the house door and remain private; and she shall not eat any dainty victual; she shall not blacken her eyes with eye-powder; she shall not view her face in a mirror; she shall never exercise herself in any agreeable employment, during the absence of her husband." (Apparently such faithful wives did exist — wives inconsolable for the absence of their lords, and who could not rest because of apprehension for their safety — for a name existed for them, *Poorookhithncrtika;* few in number they must have been, else a shorter word would have been required.) Fortunately the poor wife had not to wait the absentee's return for ever; if he had gone on a pilgrimage and was absent beyond the time agreed upon, she had to remain at his house for eight years; if he was traveling to acquire knowledge or fortune, six years she had to wait; if he had gone to marry another woman, then three years was the limit; after the prescribed period she might leave his home in pursuit of her business, without being liable to being put away by him when he did come back upon the scene. If, however, she was rash and left before the time was up, he had a right to divorce her. (Gentoo Laws, pp. 283–286: Ayeen Akbery, vol. ii, pp. 482, 507.)

The good wife in the eye of the law thus behaves ("the law is a bachelor," however, as Mr. Bumble says): "A woman who is of a good disposition, and who puts on her jewels and clothes with decorum and is of good principles, whenever the husband is cheerful, she is cheerful, and if the husband is sorrowful, the wife also is sorrowful, and whenever the husband undertakes a journey, the wife puts on a careless dress and lays aside her jewels and other ornaments; she abuses no person and will not expend a single dam (a small coin, not an oath) without her husband's consent; she has a son; and takes care of the household goods; and at the times of worship performs her duty to the Deity in a proper manner; she goes not out of the house; is chaste; she makes no quarrels or disturbances, and has no greedy passions; she is always employed in some good work, and pays a proper respect to all persons." The man who finds this paragon must take care of her. The law saith, "A woman who always acts according to her husband's pleasure, and speaks no ill of any person, and who can do all such things as are proper for a woman to do; and who is of good principles; and has a son; and who rises from sleep before her husband; such a woman is found only by much and many religious works, and by a peculiarly happy destiny; such a woman if any man forsakes of his own accord, the magistrate shall inflict upon that man the punishment of a thief. (Gentoo Laws, pp. 285–286). How like in many points to King Lemuel's virtuous wife, whose price was above rubies.

The law was equally positive as to what a woman should not do. "She shall never go out of the house without the consent of her husband, and shall always have some clothes upon her bosom, and at festivals shall put on her choicest dress and her jewels; and shall never hold intercourse with a strange man, although she may converse with a *Sinessee* (a Brahmin on a pilgrimage), a hermit or an old man; she must always dress in clothes that reach from below the leg to above the waist, and must not appear *too too decollete;* she shall not laugh without drawing her veil before her face; and shall act according to the orders of her husband; and shall pay proper respect to the Deity, to her husband, father, the spiritual guide, and the guests, and shall not eat until after she has served them with victuals (if it is physic, she may take it before they eat). A woman shall never go to a stranger's house, and shall not stand at the door; and must never look out of a window. Six

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things, continues our author, "are disgraceful to a woman: (1) To drink wine and eat conserves, or any such inebriating things; (2) to keep company with a man of bad principles. (3) To remain separate from her husband. (4) To go to a stranger's house without good cause. (5) To sleep in the day time. (6) To remain in a stranger's house." (Gentoo Laws, pp. 285, 286.)

Due provision was made for the punishment of wives who did not conform to the law of their land; in many cases the punishment was corrective; in others, to impress others. A woman who always abused her husband was treated with good advice for the space of one year, if she did not amend in that time, but still continued abusing him, he was no longer to hold any communication with her, nor keep her near him, but he still had to provide her with food and clothing. (What would the American woman who got a divorce because her husband quoted to her verses from the New Testament, about wives obeying husbands, say to a year of advice; or what the American man who got his divorce because his wife struck him with her bustle think of standing abuse for a year?) A woman who dissipated her own property, or who entertained the idea of murdering her husband, and the woman always quarrelling with everybody, and the woman who ate before her husband did so, were women who should be turned out of house and home. A wife might be turned away, if, following her own inclinations, she went withersoever she chose, disregarding the words of her husband. Manu said that a wife given to intoxicating liquors or having bad morals, or given to contradicting her husband, or attacked with incurable disease, or who wasted his money, ought to be replaced by another. If no children were born, a wife could be replaced by another in the eighth year; if none of the children lived, the husband might take another wife in the tenth year; if only daughters were born a new wife might be taken in the eleventh year, but if the wife spake with bitterness to her husband she might be replaced instantly. If while the husband was sick the wife neglected to attend to him, his only remedy was that he can refuse to speak to her for three months, and he could take back what ever presents he had given her; after this he must be reconciled to her, he could not part with her. It is clear that a man might scourge a wife, who had committed a fault, with a lash, or a bamboo twig, upon any part of the body where no dangerous hurt is likely to happen.. (Gentoo Laws, pp. 284, 285, 235: Code of Manu, ch. ix: Ayeen Akbery, vol. ii, p. 507.

If Laban had been under the jurisdiction of the Emperor Akber he could not safely have played the trick upon Jacob of giving him Leah for Rachel. Had he attempted that he would forthwith have been compelled to hand over the well-beloved Rachel as well. If a Hindu discovered any natural defect upon his wife immediately after marriage, he had a right to part with her at once, and the father of the woman was fined for his deceit in not making the blemish known. This reminds us of Heliogabalus divorcing his spouse because he discovered a mole on her body.

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HYMN TO JUSTICE.

By Charles Morse.

"I demand on behalf of Justice that, having been shown to have reality and not to deceive those who truly possess her, she may now have appearance restored to her; and thus obtain the crown of victory which is hers also."— Plato: *The Republic, II, 444.*

I.

DAUGHTER of sovran Zeus, the Lord of All,
Astræa, who didst know a mortal throne
What time the Ages ran their golden zone,
Of thee I sing! O, that we might recall
Those happy days when Earth, unvexed by brawl
Of lust and strife, sang to the stars
Sweet lauds of peace, and knew not wars;
When men wrought not for self alone
But rather for the common good,
All welded in one brotherhood!
Thrice happy days, ere thou wast driven
By Mammon's ruthless horde from Earth to Heaven!

II.

Spirit of Justice, not all desolate
Didst thou leave Earth, thy whilom pleasant home!
For as a star, set in the ambient dome,
Thou beaconest to those that on thee wait
For light to thread the path of Duty straight.
And as the scent of some rare flow'r
Haunts its abode for many an hour
After its leaves to nothingness have come,
So what thou taughtest Man on Earth
Within his laws is shadowed forth
Through all the avenues of Time,—
A spur and talisman of deeds sublime!

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III.

Great souls have gazed upon thy loveliness
From Wisdom's heights; and when the vision rapt
Had sure unfolded what thou would'st have kept
As Right inviolate, that did they press
On Man's observance with supremest stress.
We hear thy note in Vedic song,
The Prophets burn with hate of wrong,
And Plato's trump thy wondrous message swept
Throughout the Pagan world for aye!
And so we children of to-day
Upon the corner-stone of old
Would fain uprear another Age of Gold!

IV.

Imperial Rome first signalled thy return
When she promulged that mighty code of laws
Which breathes thy savour in its every clause,
And sets thy seal on Earth's remotest bourn.
O, they are blind who cannot now discern
The dawn of a new jural reign,
When thou shalt live with men again;
When only he shall win the world's applause
Who yields his brother truth and right,
And mirrors in his life thy light;
When all the surging waves of Hell
Shall break in vain on thy strong citadel!

V.

O Goddess, Essence, whatsoe'er thou art,
Let the glad pæan thrill our wistful ear:
"*Astræa Redux!* Once more is Justice here
To make her lodgment in the human heart,
Nor from that loved abode to e'er depart!"
Ah! this is what Man long has sought,
The end for which his laws have wrought,
The goal and crown of all the soul hold dear.
Come, then, and bring us sweet surcease
From wrongs that long have slain our peace;
Come, and the day millennial bring —
Come usher in the reign of Christ the King!

Ottawa, Canada.

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THE SUPREME COURT OF MAINE.

IV.

By Charles Hamlin.

WILLIAM PENN WHITEHOUSE, the sixth associate justice, is a native of Vassalborough, Kennebec County, Maine, where he was born April 9, 1842. His parents were John Roberts and Hannah (Percival) Whitehouse. His first American ancestor was Thomas Whitehouse, who settled at Dover, N. H., in 1658, married the daughter of William Pomfret, town clerk, and died December 3, 1707. His mother was a descendant of John Percival, of Barnstable, Massachusetts. Besides attending the common school of his own district, working on his father's farm, and attending the high school at China, he began at the age of sixteen to fit himself for college at the Waterville Academy in February, 1858. Here he made such rapid progress that he was able to enter Colby University in the following September without conditions. He was graduated in 1863, with first-class honors, delivering an English oration at commencement and for which he chose as his subject, "*Esprit sans esprit partisan.*" On receiving his degree, Master of Arts, he was again appointed from the two of those who had attained the first honors to deliver a Master's oration, for which he selected as his subject: "Practical Scholarship."

Among his classmates in college were Gov. Marcellus L. Stearns, of Florida; Col. F. S. Hesseltine of the Boston Bar, and Dr. John O. Marble, Worcester, Mass. Among his contemporaries were Alfred E. Buck, of Alabama, member of the forty-first Congress; J. Manchester Haynes, of Augusta, Speaker of the Maine House in 1883, and president of the Senate in 1879; Richard Cutts Shannon, of New York City, member of Congress; Col. Z. A. Smith, of Indianapolis, soldier and journalist; Col. H. C. Merriam, of the U. S. Army, and George Gifford, journalist and now U. S. Consul at Basle, Switzerland.

He began soon after graduation to teach and was the principal of Vassalborough Academy for a while. Having decided upon the profession of law, he first entered the office of the late Sewall Lancaster, Esq., of Augusta, and afterwards continued his studies with Senator Hale, at Ellsworth. He was admitted to the Bar in Kennebec County in October, 1865. His first year's practice was in the city of Gardiner, with Lorenzo Clay, Esq., as a partner. In December of 1866, he removed to Augusta, ever since his residence, and where he formed a partnership with Mr. Gifford which lasted for a few months, until June, 1867, when the latter entered journalism on the staff of the Portland Daily Press, and subsequently became editor-in-chief.

Entering upon a general practice, for which he was well fitted both by aptitude and diligent application, he soon gained the confidence of clients and the community for integrity and ability. In 1868 he was elected city solicitor. During his incumbency in that office he defended the city successfully in several important cases, establishing his reputation for legal ability by his skill and power as an advocate. In October, 1869, he was appointed county attorney by Governor Chamberlain, to fill a vacancy caused by the death of Francis E. Webb, Esq., of Winthrop; and was twice elected afterwards to the same office, thus serving more than seven years in all. The experience acquired by a prosecuting attorney is invaluable to himself, since he thereby competes with many able lawyers; and equally so to the State when, as in this case, Judge White-

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WILLIAM P. WHITEHOUSE.

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house increased his reputation by his efficiency and zealous discharge of his duties, supplemented by a magnanimity for which his professional brethren have always given him due credit.

An early case that he thus conducted was State *v.* Kingsbury, reported in 58th Maine, page 238. The respondent was indicted for procuring one James Kitchen to set fire to a church in China. The motive for this crime was a desire to be revenged upon prominent members of the church society who had caused Kingsbury to be punished for repeated violations of the "Maine Law." He was a prominent business man and had the sympathy and active support of many friends, including all opposed to the law. He was ably defended by Messrs. Pillsbury and Clay, and was convicted at the second trial, in March, 1870, before Judge Danforth, who sentenced him to three years in the State's prison. In the following October (1870) occurred the capital case of State *v.* Edward H. Hoswell, indicted for the murder of John B. Laflin at Hallowell, in which Attorney-General Thomas B. Reed made his first appearance for the government. County-Attorney Whitehouse prepared the case for trial and made the opening argument. The trial became notable for the defense of momentary insanity as urged by the counsel for the defendant, Messrs. Pillsbury and Libbey—the last named afterwards associate justice of this court. This defense had recently been successfully employed in the Cole-Hiscock and Richardson-McFarland cases in New York, similar cases, where the motive for the homicide was the prisoner's jealousy of his wife on account of her alleged intimacy with the deceased. But County Attorney Whitehouse, who carefully prepared the case for the State, anticipated this line of defense, and fully exploited it in his address to the jury, some extracts from which are given here. In alluding to this defense, Mr. Whitehouse said: "We are not here in behalf of the government to defend adulterers; we are not here to bring desolation upon happy homes or to destroy any of the sacred interests of society. Neither are we here to countenance the doctrine of assassination or private vengeance. We are here to ask you to protect society against all of these crimes by a just and fearless administration of the law. We are here to ask that when a citizen of Maine is charged with crime, he shall be permitted to go into the people's court and be heard, as this prisoner is to be heard, and be punished only when found guilty by the judgment of his peers. We are here asking that when an atrocious crime has been committed, the perpetrator shall not escape upon any false plea of frenzy or temporary insanity, or any other plea in violation of law and evidence. We are here asking that no man shall be the self-appointed avenger of his own wrongs, that no man shall assume to act, in a moment of passion, as judge and jury, and condemn and execute a fellow citizen, unheard and untried, when a single word of explanation might demonstrate his innocence. . . . Why, gentlemen, human laws are enacted and penalties imposed for the special purpose of strengthening men's power of self-control in the community, and holding them up to a strict sense of duty and accountability. If a paroxysm of rage or fit of passion arising from morbid jealousy, or from any other cause, can become legal insanity, who can be called sane? Who would be responsible for crime? What would prevent all offenders from stalking unwhipped of justice? Where is our public security? Who would be safe in his life or his property? If one may plead an outrage upon his feelings as a husband in justification of a great crime, another with equal right may plead a serious injury to his person or property.

"If the citizens of Hallowell, on the night of this tragedy, had assumed in violation of all law to act as judge and jury, and had

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hung this prisoner over the bloody scene, who of them would be allowed to come in and plead that they had only meted out to him that justice which he claimed to have meted out to another? The moment we allow ourselves thus to travel one step beyond the limits of the law, we are tending towards the abolition of all law and a reign of terror."

After a six days' trial, a brief and brilliant closing argument by the attorney-general, and an able and exhaustive charge by Judge Walton, the jury remained in consultation throughout the night, standing eleven for conviction for murder in the second degree and one for manslaughter. To avoid a disagreement the eleven finally went over to the obstinate one and returned a verdict of "guilty of manslaughter." The prisoner served a sentence of nine years in the State prison.

During a diligent and active practice in his profession he found time to discharge other important duties which the good citizen often finds imposed upon him and willingly assumes. In 1873 he was chairman of the commission on "The New Insane Hospital," and wrote the report which was published by the State. He advocated the adoption of a system, after careful investigation, that was indorsed by the highest medical authorities. He entered, in 1875, into the agitation which secured the abolition of the death-penalty that had been recently revived, although, with a few years' exceptions, it had remained undisturbed on the statute since prior to 1840, when it became the settled policy of the State. This agitation resulted favorably. The result was largely due to the leading and influential part he took in the measure and by moulding public sentiment on the subject. It is interesting to note here that another distinguished graduate of Colby University, the late J. Young Scammon, of Chicago, appeared before a committee of the Maine legislature as early as 1837, accompanied by a delegation of students from that college, to advocate the same measure, and made many converts. Some of the latter, who afterward attained high stations in public life, were efficient in keeping the State moored safely to this humane legislation. Again, in 1883, after he had become judge of the Superior Court, he appeared before the judiciary committee at a public session in opposition to a bill to restore the death penalty; and I well remember his cogent argument replete with statistics, and persuasive eloquence that seemed unanswerable.

In 1879 he was chairman of the committee of citizens in the city of Augusta that erected the graceful and artistic Soldiers' Monument which adorns the public square in that city.

By act of the Legislature of 1878 the Superior Court for Kennebec County was established, and on February 13th he was appointed to its bench. This court, auxiliary to the Supreme Judicial Court, had jurisdiction of all civil suits at law, except real actions, and exclusive original and appellate jurisdiction in all criminal matters in the county, including capital cases. This court sat in Augusta with five jury terms each year until 1889, when two sessions were held in Waterville and the Augusta terms were reduced to three. After the second year of its establishment, its powers were enlarged so that it comprised the entire criminal jurisdiction, including capital cases. In its civil department it included divorces and all civil actions except real actions and trespass *q. c.*, exclusive, up to five hundred dollars, and concurrent jurisdiction with the Supreme Judicial Court of all such actions when the damages exceeded that amount.

The twelve years during which Judge Whitehouse presided in the Superior Court are remembered for the ease and urbanity with which he dispatched business. Industrious and polite, clear and interesting in his charges to the jury, he soon became popular, in the right sense of that word, with

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the Bar, and retained its respect and esteem. His rulings were rarely ever reversed by the law court. His judicial life resembles that of Chief-Justice Weston, *ante*, page 468, of his city, and with whom he has many traits and qualities in common; but, perhaps, having more active humor and the cultivation of that natural and easier intercourse that exists between the Bench and Bar in later times.

In the early days of the Superior Court a lawyer, who was also a general of the State militia, appeared in court on the second day of the term (which was also the first day of the State muster), in full uniform, and with a very impressive manner and *ore rotundo* utterance moved for a continuance of his cases, for the reason that he was then engaged in the military service of the State. Without any hesitation the Judge said to the clerk: "Enter, motions granted: '*inter arma, silent leges*.'" There was a very perceptible smile on the countenance of the Bar.

On another occasion an inmate of the Soldier's National Home, at Togus, was arraigned at the bar on an indictment charging him with a heinous crime. It subsequently appeared that he was laboring under religious delusions and was mentally unsound. Not knowing this, the Judge made the usual inquiry if he had any counsel to appear for him. He replied somewhat indistinctly: "No, your Honor, Jesus will plead my cause." At the next instant, a prominent member of the Bar, who had been retained by a friend of the prisoner, and who was afflicted with partial deafness, having heard the Judge's question, but not the prisoner's answer, innocently responded, "Yes, your Honor, I appear for the respondent." Thereupon the the Judge remarked to the clerk *sotto voce:* "It is fortunate for the prisoner that Brother P. has been employed, for I am afraid the counsel retained by the prisoner might not put in an appearance in this court."

While at the bar he rarely indulged in wit or made any use of sarcasm; but in the early days of his practice and before he held any public office he indulged once in the following repartee, to the evident discomfort of the speaker. A federal office-holder undertook to deliver a homily on the evils of delaying suitors for "lucre and malice," and in the presence of several other gentlemen became discourteous and even offensive to the young lawyers present, concluding with the remark that the "law's delay" was recognized as an intolerable evil in the time of Shakespeare. Being well-versed in the study of the great dramatist the young lawyer instantly replied: "I beg leave to remind the gentleman that, among the grievances of life that ought not to be borne, Hamlet also mentioned the 'insolence of office.'" It is needless to add that the discomfiture of the office-holder was complete.

In the summer of 1888, Judge Whitehouse, in behalf of the citizens of Augusta, delivered an address of welcome to Mr. Blaine, upon his return from Europe, which was widely reported and commended for its felicity and eloquence.

A portion of his charge to the jury, in the case State *v.* Burns, will be found in 82 Maine, 558. The defendant was an importer of liquors in the original packages, and boldly asserted his right to sell them in that condition in this State, claiming he was protected in such privilege by the United States Constitution. The trial excited great interest throughout the State. It took place before the decision by the United States Supreme Court in the case of Leisy *v.* Hardin (135 U. S. 100), and the Judge, in accordance with the well-established rule governing subordinate courts, instructed the jury that the law of Maine, which the defendant was charged with having violated, did not contravene the United States Constitution. It was in this connection that the Judge made the remark which voiced the moral sentiment of the public conscience,

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and for its pith attracted attention: "The right of the importer ends where the law of self-preservation necessarily begins."

Judge Whitehouse was appointed to the bench of this court April 24, 1890, succeeding Judge Danforth, who died the 30th of March preceding. His previous experience on the bench of the Superior Court at once gave assurance of his success as a *nisi prius* judge in this court, and the last five volumes of Maine Reports amply attest the ease and ability with which he performs his work as a law judge. He has already written several opinions noted for their interest and which show a full and vigorous style. His references to the authorities and decided cases are ample and with enough of apt quotation to save the reader from the labor of taking the book itself down from the shelf. Of his opinions I think the following will fairly exhibit these qualities: Jackson *v.* Esten, 83 Maine, 162 (fraudulent conveyances); Lyman *v.* Kennebunkport, ibid., 219 (pauper); Haight *v.* Hamor, ibid., 453 (deed); Dean, petitioner for naturalization, ibid., 489; Steward *v.* Welch, 84 Maine, 308 (mortgage); Coffin *v.* Freeman, ibid., 535 (real action); Atty. Genl. *v.* Newell, 85 Maine, 246 (mandamus, elections); Engel *v.* Ayer, ibid., 448, (deed); Curran *v.* Clayton, 86 Maine, 42 (Australian ballot); Rogers *v.* Steamboat Co., ibid., 261 (free pass); Chase *v.* Portland, ibid., 367 (way, damages); Pollard *v.* R. R. Co., 87 Maine, 51 (negligence, remote and proximate cause); *In re* R. R. Commissioners, ibid., 247 (grade crossings); Pulsifer *v.* Berry, ibid., 405 (experts); Doyle *v.* Whalen, ibid., 414 (charity, Eastport Fire Fund); Hall *v.* Perry, ibid., 569 (testamentary capacity); Smith *v.* R. R. Co., ibid., (contributory negligence, flying-switch).

His style indicates a good knowledge of both English and Latin classics, and is natural and finished. His sociability makes him an engaging companion and a charming conversationalist. His love of nature—for he is a good hunter and fisherman—combined with a genial and sunny temperament, will prevent his becoming narrow or over-conservative.

He received the degree of Doctor of Laws from his *alma mater*, Colby University, at the last commencement.

ANDREW PETERS WISWELL, the seventh associate justice, only child of Arno and Sally (Peters) Wiswell, is a native of Ellsworth, Hancock County, Maine, where he was born July 11, 1852. His father, the late Arno Wiswell, whose friendship and hospitality I enjoyed when I began the practice of the law in the same county, was a leader in the Hancock Bar and well known for his power as an advocate, a love for his profession and genial courtesy in his intercourse with men. His addresses to the jury, especially in criminal cases, were powerful and at times eloquent. While he did not seek political preferment he was always a trusted adviser of the Democratic party, whose principles he early adhered to and for which Frankfort, Waldo County, his place of nativity, was noted.

Judge Wiswell's maternal ancestors have been already described in the sketch of Chief Justice Peters, *ante*, p. 516, and of whom he is a nephew.

His preparatory course of education was at the Eastern Maine Seminary at Bucksport, and he next entered Bowdoin College from which he was graduated in 1873. His college life was largely devoted to history, general literature and debating. In the latter branch he became proficient and was president of the society for a time. Upon his graduation he began the earnest and diligent study of the law under the excellent tuition of his father, and was thus able to gain admission to the Bar in the following year; and became a partner with his father in January, 1875. His mental aptitude and training soon took him into the active trial of

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cases and the general management of business in court, in both of which he happily succeeded. Upon the death of his father, which occurred in 1877, be took Arno W. King as a partner, and in 1888 John A. Peters, Jr.

He was judge of the Ellsworth Municipal Court from 1878 to 1881, and National Bank Examiner for Maine from 1883 until his resignation in 1886. He was a delegate to the National Republican convention in 1884, and president of the Republican State convention of 1888 at Portland, making an opening address of marked force and ability. He was a member of the House of Representatives in the Maine Legislature in 1887, 1888 and 1890, serving, in the session of 1885, as chairman of the judiciary committee on the part of the House, and as Speaker during his last term. He acquired much credit and reputation in both positions, and was a leading debater and excellent presiding officer. He spent the winter of 1888 traveling in Europe.

In the trial of cases, when at the bar, he evinced a thorough mastery of the facts and the law, so that he was never taken by surprise. He readily seized upon the strong points and kept them before the jury. This, to be sure, is the recognized rule with successful advocates, but no details of minor importance were overlooked in the progress of the trial, and his opponent could not safely attempt to divert attention by introducing them. His law briefs were exhaustive and orderly; but I have heard him argue law cases *ore tenus* with hardly a reference to his brief, and thus put the court in possession of the merits of a case without that weariness which so often accompanies the reading of long written arguments.

I never knew him to submit a law case "on briefs," however well prepared. Both these things are deserving of notice especially as the Hancock Bar enjoys an enviable reputation before the law court for readiness and ability. A good example of his briefs in a law case is to be found in Warren *v.* Kelley, 80 Maine, 512, treating of admiralty and constitutional law, and already mentioned in my sketch of Judge Foster, *ante*, page 567.

Judge Wiswell was appointed to this court April 10, 1893, succeeding Judge Virgin, who died January 23 of the same year, and is the youngest man ever appointed to the Supreme Judicial Court of Maine. His appointment was well received and Governor Cleaves was highly commended throughout the State for his good judgment in making this selection. The three years in which he has occupied the bench not only prove the wisdom and fitness of his appointment, but they have also established that degree of appreciation and confidence in the community which belongs to talent and character when usefully employed in broader fields.

Nature gave him a good legal mind. And while he is a born lawyer, his experience as a bank officer and legislator, added to that acquired at the bar, makes him a better judge at the beginning. Judge Mansfield used to call into his court the merchants of his day in order that he might learn their rules of business relating to commercial paper, and adopted the law-merchant as a part of the English common law. The active practitioner of the present day, like Judge Wiswell, is not such a recluse as that; and on coming to the bench his knowledge of business enhances his usefulness to the State. So there was nothing experimental in his promotion, and when he took his seat upon the bench for the first time, which happened to be in the city of his home, there was no sign either of nervousness or elation in his new position. There was nobody present who did not rejoice in his elevation, and a member of the Bar has since told the whole story when he said, "that while the Bar would look up to Judge Wiswell, he was sure the Judge would never look down on the Bar." He presides at *nisi prius* like one

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ANDREW P. WISWELL.

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"to the manner born," and his charges to the jury are interesting for clearness of statement and fairness in presenting the contentions of each side. His summing up in a recent capital case, in a trial which lasted upwards of ten days, disclosed an unrivaled power of memory and that did not require a reference to any minutes of the testimony.

His opinions in the law court are generally dictated to a stenographer. In point of language their style and composition demonstrate the fact that directness, clearness, force and ease may thus be obtained, even if with the possible loss of the glow of composition that so much delights the writer. There is, however, an advantage in this method, provided one has carefully matured in his mind what he intends to say. He rids himself of a vast amount of mechanical drudgery, economizes his time, and in the same time disposes of more work. It has also another and singular quality,—one by which I first discovered that the Judge dictated his opinions,—it conveys to the reader the sound of the voice of the person dictating if you are familiar with it. The tones of the voice are perceptible to the mental ear, and I observed this in the first case of his that came to my hands as Reporter of Decisions. The clear soprano tone of his voice was perceptible to me at once. The labor-saving stenographer has come to stay. His influence upon us must, in the main, be highly beneficial, whatever it may be upon poetry and purity of style. Nothing but the fixed habit of manual composition, incident to years, prevents its general adoption in all literary occupation.

His first opinion, Mitchell *v.* Abbott, 86 Maine, 338, is a somewhat curious one by reason of the peculiar facts embodied in it. It was an action against the trustees of the Dexter Savings Bank to recover a reward of one thousand dollars, offered by those officers for the detection of the murderers of the treasurer, Barron, of that bank. Barron was murdered February 22, 1878, and the offer of reward, without any limit as to its duration, signed by President Bradbury, was made the following day. This action was not brought until after the lapse of nearly fifteen years from the date of the offer of the reward. It was admitted that the murderers, Stain and Cromwell, were convicted of the crime and sentenced to prison for life on March 31, 1890. An interesting question arose, which the counsel argued fully, whether the defendants were personally liable; but the court did not consider it necessary to consider it, and held that, in view of the time which had elapsed between the offer and the conviction, a withdrawal or revocation of the offer must be presumed to have occurred before it had been accepted.

In a recent case, Norway Savings Bank *v.* Merriam, to appear in the 88th Maine, Judge Wiswell has written a satisfying opinion upon that branch of the law relating to deposits "in trust," and which have given the courts not a little trouble and resulted in decisions in some States, not easily reconciled with each other. The opinion helps clear up some of the uncertainties, and makes plain that gifts in such form, to be sustained in equity, must be based on an intention of the donor, accompanied by a declaration of the trust. It will furnish an admirable guide for savings bank officers, and serve as an oft-cited case for the profession. It has already been commended by treasurers of banks who have had experience in such matters and who have called for advanced copies of it.

Those little lights and shades which enter into the full picture of a man do not require much more to be said. He is agreeable at all times, and of a companionable disposition. He enjoys a good story, is a good listener and a great reader. In conversation he draws information from others as well as imparting it, and his manner is that of a quiet *raconteur*.

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His best and largest contribution to society and government has been his allegiance to the law. The loyalty of that allegiance went with him upon the bench, where supremacy of the law is the indispensable condition of all justice.

The object of these brief sketches of the courts and judges of Maine has been to collect and help perpetuate in some compact and convenient form, in the GREEN BAG, the lives of the men who deserve remembrance and gratitude for all time, both on account of their eminent character and also the high service they have rendered the State. In gathering the data of those who have passed beyond this life, the occupation has been pleasant and agreeable. These pen portraits of my contemporaries, and for the accuracy of which I am alone responsible, are drawn from daily observation and contact. I have not thus far undertaken to forecast their future, because their past has already "made assurance doubly sure." And this remark applies equally well in the case of Judge Wiswell.

SEWALL CUSHING STROUT, the eighth associate justice, was born in Wales, Androscoggin, formerly Kennebec County, Maine, February 17, 1827. He is the only child of Ebenezer and Hannah (Cushing) Strout. His ancestors came originally from England and settled in Cape Elizabeth; thence his grandfather moved to Wales, and lived there the remainder of his life. Ebenezer Strout was born in Wales, and was a trader. In 1834 he removed his family to Topsham, and in 1841 went to Portland, the son then being fourteen, and of suitable age to enter Master Libby's High School. When he was eighteen his health failed and his parents decided to discontinue his studies, and he entered David J. True's dry goods store, but remained there little more than a year.

It is a fortunate thing for a young man when he himself chooses his calling in life, especially when his choice and talents coincide. While employed in the store of Mr. True, he decided to enter the legal profession, and had begun already a course of reading that occupied all the time that he could command, day and night. His parents desired that he should become a doctor, but the young man took a firm stand for the law, and in the end they yielded to him. He then entered the office of Howard and Shepley, who afterwards became distinguished judges, and was admitted to the Bar in 1848, when twenty-one years of age. He began the practice at Bridgton, where he remained until 1854, having secured a good business. He then removed to Portland, and after a year's practice alone formed a partnership with Hon. Joseph Howard, under the style of Howard and Strout, his former preceptor having retired from the bench of this court after a service of one term. This firm continued until 1864, and Mr. Strout was alone until 1866, when he formed a partnership with Hanno W. Gage, which has continued until he was appointed an associate justice of this court. In the mean time his eldest son was admitted to the firm, and upon the latter's death in 1888 his second son became a partner.

From the beginning Mr. Strout has had a large practice of the highest grades of legal business. He has taken part in important cases beyond as well as within the limits of the State, and, thoroughly versed in all the legal literature of the day, he has been favorably known as one of the leading lawyers of the Maine Bar. While at the bar he was a representative lawyer both in the State and Federal courts, and did not allow himself to deviate from his profession by entering into politics or business enterprises and speculations. Adhering to the general practice of his profession, but never engaging in pension and patent cases, he has made no specialty of any one branch, and has been considered a good all-round lawyer in all its departments, preferring, perhaps, the civil to

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the criminal side of the courts. He was equally effective in the law court as before a jury. His jury arguments combined plausibility as well as intelligence of thought and clearness of statement. His perfect self-possession, freedom from temper and irritability, and agreeable and engaging manners, made him a difficult, but never a disagreeable opponent, in or out of court.

He has suffered no interruption in his practice except once, in 1863–4, when he was prostrated with a critical illness, having taken no vacation up to that time. Upon his recovery he sought out-door recreation under his physician's advice, and became a follower of the gentle angler Izaak Walton. He takes a vacation regularly each year at Moosehead Lake, and is an expert fisherman, scorning to lure the speckled trout with an angle-worm or anything but the fly.

His forty-five years at the bar have been active, busy and happy, almost without any eventful incidents that sometimes create episodes in one's life. The current of his daily life has flowed like a peaceful brook, smoothly and tranquil. When Judge Lowell resigned from the Circuit Court of the United States, the Bar of Maine almost unanimously recommended Mr. Strout to the vacancy. Although the appointment went to another State, it was the ardent wish of all who knew his ability and fitness that he might succeed to the position. At that time such testimony of the approval of those who knew him best was more gratifying to Mr. Strout than any other honor that could have been accorded him. In the meantime his associates in the Cumberland Bar elected him their president, and he retained this honorable office for nearly ten years, fulfilling all its duties in a satisfying manner. There are many cases both interesting and amusing in such a long practice. Of the latter one occurred when he was fresh with his new honors as an attorney and counselor at law. He appeared for an eccentric old bachelor who complained of some boys for malicious mischief in throwing down his stone wall. At the trial it appeared that these young men and some girls were out on a lark, and some of them, probably the girls, threw down his wall for the purpose of teasing the old gentleman. The trial took place in a schoolhouse, which was filled with young people who demonstrated quite plainly that their sympathies were not with the complainant. For want of evidence the justice decided in favor of the defendants, and shouts of approval followed the announcement of the decision. The complainant was surprised at the result, and, sitting quietly on his chair near the door, neither stirred nor made any effort to move. Thereupon six or eight of the girls started to go out, and to show that there was no malice in their hearts, each one in turn, on passing the old bachelor, kissed him.

Quite a different case was another one, State *v.* Charles H. Witham, charged with homicide of a child immediately after its birth, and tried in 1879 before Judge Bonney in the Superior Court for Cumberland County. The theory of the State was that the defendant was the father of the child; that he procured an abortion, being a physician; and that the child being born alive, he killed it. The present Judge Haskell was the prosecuting attorney and tried the case with zeal and ability, being at the time persuaded of the defendant's guilt. The defense was that the child was born dead, while the government claimed the contrary, and that Witham cut its throat. To prove these facts the government called a woman who was present at the birth and testified that the child's throat was cut, and that she saw the wound. The trial occurred about four weeks after the birth, — a six months' child, and the *fœtus* had been thrown into a manure heap. A careful search having been made, the *fœtus* was found and produced in court. The throat was not cut, the verdict was "not guilty." When the case was opened to the jury, Mr.

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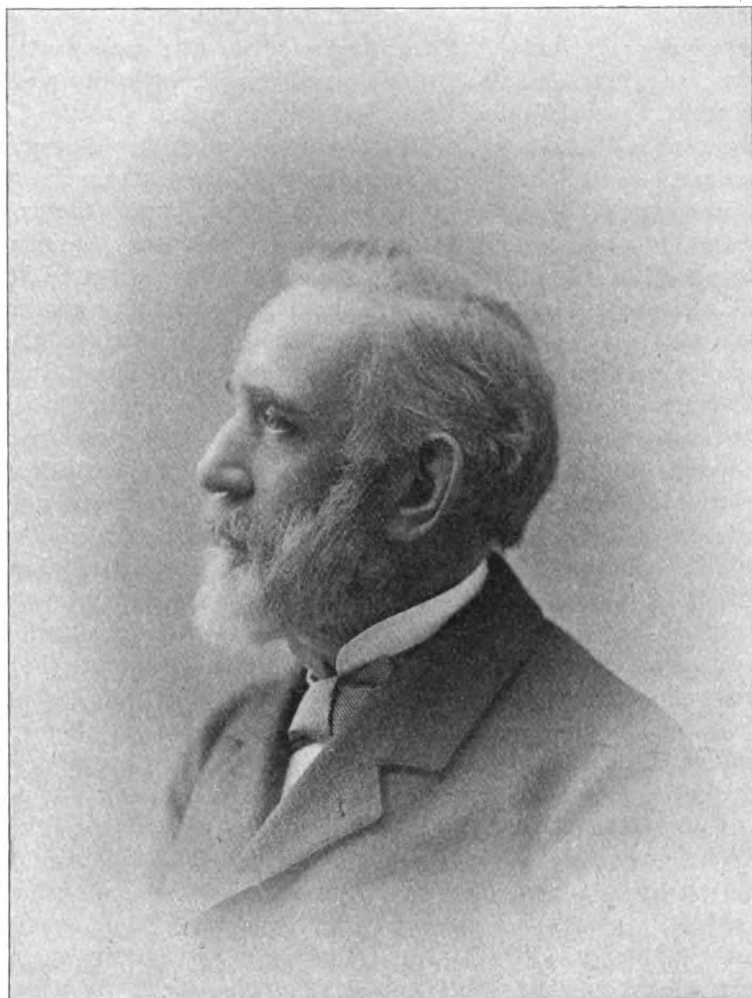

SEWALL C. STROUT.

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Strout had agreed to sit near the regularly retained counsel of the defendant for the purpose of advice and consultation only, but he soon saw that something more was required if there was to be a successful defense, and with characteristic generosity undertook the task with the result already stated.

An important equity suit, Railroad Co. *v.* Belfast, 77 Maine, 445, in which Mr. Strout was counsel for preferred stockholders, came before the court in 1884–5 and attracted attention on account of its novelty. The court, in its opinion by Chief-Justice Peters, decided in favor of the claim for dividends, sustaining the contention of the preferred stockholders. This case is often quoted on the question of what are "net earnings," and when stockholders may compel the payment of dividends.

White *v.* Insurance Co., 57 Maine, 91, was a noted one at the time by reason of there being but two decisions cited by the counsel, one by each, and they, one in Illinois and the other in Pennsylvania, being opposed to each other. Insured goods had been removed from a building not on fire, but in close proximity to burning buildings, and in the removal were damaged. The building from which they were so removed was not burned, and if the goods had not been removed they would have been unharmed. In an action on the policy Mr. Strout claimed damages for a "loss by fire." The late Judge Davis, who appeared for the defendant, argued the contrary. The court sustained the view of the law taken by Mr. Strout, who argued the question ably on general principles.

A late jury case which excited considerable attention on account of its political aspect, and which Mr. Strout defended, was U. S. *v.* Biddeford Aldermen, in the U. S. Circuit Court, before Judges Colt and Webb, indicted for fraudulently tampering with the voting lists of that city. The defendants were Democrats, while the jury was composed of eight Republicans, three Democrats and one Mugwump. Mr. Strout, with whom Mr. Haley was associated, took a great interest in the case, and against the vigilant prosecution of District Attorney Dyer obtained an acquittal.

For the past twenty years the State of Maine, although strongly Republican, has adhered to the policy of appointing one member of the minority party to the bench of the Supreme Judicial Court. Its first appointment of this kind was the late Hon. Artemas Libbey, whose character and ability alone entitled him to the position which he adorned for nearly twenty years. Upon his death, which occurred March 15, 1894, by an almost unanimous voice, Hon. Sewall C. Strout succeeded to the vacancy, and having been appointed April 12, he began the duties of his judicial life on the twenty-fourth day of the same month at Houlton. Such a natural and suitable destiny, and the fulfillment of the ambition of so devoted and successful a lawyer, is considered fitting throughout the State. Younger members of the Bar are encouraged and all know they can try their cases before a judge who can and does appreciate the rights of counsel in the trial of their causes. Besides this, his temperament excludes any idea of sternness that inclines toward severity, while his firmness is rather of a paternal manner withal in stilling and quieting the passions and excitements of litigants. He has contributed to the law two valuable and important opinions. The first, State *v.* Hamlin, 86 Maine, 495, sustains the constitutionality of the "Collateral Inheritance Tax"; and the second, Somerset Ry. *v.* Pierce, to appear in the 88th Maine, confirms the validity of the plaintiff corporation, that had been organized under the foreclosure of a mortgage.

It is a pleasure to meet the Judge socially. His conversation indicates a man of broad views and sympathies. He has a playful humor, and when combined with wit is pro-

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vocative of honest laughter. He once had a very sober-minded student who did not always take in a joke. Having passed a satisfactory examination upon his admission to the Bar, the Judge gave the young man some sound advice, and with a merry twinkle in his eye, concluded with this remark: "Young man, remember the leading rule in a lawyer's practice, never to lie without a retainer."

THE DANCING CHANCELLOR.

WHAT was the astonishment of courtiers, of lawyers, and of citizens, when on Saturday, the 29th of April, 1587, it was announced that Queen Elizabeth had chosen for the keeper of her conscience, to preside in the Chancery and the Star Chamber and the House of Lords, and to superintend the administration of justice throughout the realm, a gay, foppish cavalier never called to the bar, and chiefly famed for his handsome person, his taste in dress, and skill in dancing — Sir Christopher Hatton! In the long reign of Elizabeth no domestic occurrence seemed so strange as this appointment; but, with the exception of her choice of Burghley for her minister, she was much influenced in the selection of persons for high employment by personal favor.

Before Sir Christopher was made Lord Chancellor, he had been the Queen's Vice-Chamberlain, and one of her especial favorites, and it was said he was the only one of her troupe of gallants who remained single for her sake.

While he spent much of his time in dicing and gallantry, there were two amusements to which Sir Christopher particularly devoted himself, and which laid the foundation of his future fortune. The first was dancing, which he studied under the best masters; and in which he excelled beyond any man of his time. The other was the stage. He constantly frequented the theatres, which, although Shakespeare was still a boy at Stratford-on-Avon, were beginning to flourish; and he himself used to assist in writing masques, and took a part in performing them. He was one of five students of the Inner Temple who wrote a play, entitled "Tancred and Gismund," which in the year 1568 was acted by that society before the Queen.

When he became a great man, his flatterers pretended that he never meant to make the law a profession, and that he was sent to an Inn of Court merely to finish his education in the mixed society of young men of business and pleasure there to be met with; but there can be no doubt that, as a younger brother of a poor family, it was intended that he should earn his bread by "a knowledge of good pleading in actions real and personal"; and the news of the manner in which he dedicated himself to dancing, which made his fortune, must have caused heavy hearts under the paternal roof in Northamptonshire.

Some of the courtiers at first thought that the appointment was a piece of wicked pleasantry on the part of the Queen; but when it was seen that she was serious, all joined in congratulating the new Lord Chancellor, and expressing satisfaction that her Majesty had been emancipated from the prejudice that a musty old lawyer only was fit to preside in Chancery; whereas that court being governed, not by the strict rules of law, but by natural equity, justice would be much better administered there by a gentleman of plain, good sense and knowledge of the world. Meetings of the Bar were held, and it was resolved by many ser-

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jeants and apprentices that they would not plead before the new Chancellor; but a few, who looked eagerly for advancement, dissented. The Chancellor himself was determined to brave the storm, and Elizabeth and all her ministers expressed a determination to stand by him. He was exceedingly cautious, "not venturing to wade beyond the shallow margin of equity, where he could distinctly see the bottom." He always took time to consider in cases of any difficulty; and in these he was guided by the advice of one Sir Richard Swale, described as his "servant-friend," who was a doctor of the civil law, and a clerk in the Chancery, and well skilled in all the practice and doctrines of the court.

While holding the Great Seal, Sir Christopher's greatest distinction continued to be his skill in dancing, and as often as he had an opportunity, he abandoned himself to this amusement. Attending the marriage of his nephew and heir with a judge's daughter, he was decked, according to the custom of the age, in his official robes; and it is recorded that when the music struck up, he doffed them, threw them down upon the floor, and saying, "Lie there, Mr. Chancellor!" danced the measures at the nuptial festivity.

At Stoke Pogis, in Buckinghamshire, he had a country house constructed in the true Elizabethan taste. Here, when he was Lord Chancellor, he several times had the honor to entertain Her Majesty, and showed that the agility and grace which had won her heart, when he was a student in the Inner Temple, remained little abated.

The Queen's admiration for him seems finally to have somewhat cooled, and all contemporary accounts agree that her neglect and cruelty had such an effect upon his spirits that he died of a broken heart. In Trinity term, 1591, it was publicly observed that he had lost his gaiety and good looks. He did not rally during the long vacation, and when Michaelmas term came round, he was confined to his bed. His sad condition being related to Elizabeth, all her former fondness for him revived, and she herself, so the story goes, hurried to his house in Ely Place with cordial broths in the hope of restoring him. But all in vain! He died on the 21st of November in the fifty-fourth year of his age.

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LONDON LEGAL LETTER.

LONDON, DECEMBER 2, 1895.

THE past weeks have been marked by an unusual activity in what may perhaps be best described as the speculative rather than the operative work of lawyers. First of all, and to mark the closing days of the long vacation, the Incorporated Law Society held its twenty-second annual provincial meeting in Liverpool. The work of the society at these gatherings is not unlike that of the American Bar Association at its annual meetings, but there is a vast difference in the constitution of the two bodies. The Incorporated Law Society is composed of solicitors only, and is the closest kind of a trades union. Although its recent meeting was only the twenty-second of the series which it has held annually out of London, it is in reality seventy years old, and is the lineal successor of a similar organization which had been in existence for nearly one hundred years when the present society took up its work. No solicitor can obtain admission to practice in England and Wales without the sanction of the society and without paying tribute to it. It has supreme and absolute control of the examinations of articled clerks. It imposes the course of study which must be pursued, it appoints the examiners and, finally, it admits or rejects the candidates. Those whom it elects to admit to practice law (always, it must be remembered, on the solicitor's side of the house, for this organization has nothing to do with the "upper" branch of the profession, which is composed exclusively of barristers) must, under an act of Parliament, pay a registration fee of five shillings and an admission fee of five pounds into its treasury. Unless these requirements are complied with one may not be enrolled as a solicitor, and if one should perform any service as a solicitor without first having been enrolled, he would be subject to dire penalties. More than this the Incorporated Law Society has a standing committee on discipline which exercises its powers under parliamentary authority. To this committee is referred, in the first instance, all complaints against solicitors. They are carefully and judicially investigated, counsel being admitted to appear for the accused. The findings of the committee are reported to the society, and then proceedings are taken in the courts to determine the punishment of the offending solicitor.

The society has imposing premises within a stone's-throw of the Royal Courts, in which there are spacious rooms for the convenience of solicitors and their clerks, and for conference with clients. There is also an excellent library and a banqueting hall, together with a large number of dining and lounging rooms. Altogether, putting it in round numbers, there are 15,200 solicitors in England and Wales, and of these more than 7,500 belong to the Incorporated Law Society, while quite one-half of those who are not on its rolls are affiliated with it through branch societies all over the country. The power of the society is therefore unique, and not paralleled in the world. To make a local illustration, it is as if a central body in New York, for example, should embrace within its membership three-fourths of all of the lawyers in the State, hold power from the Legislature to compel every candidate for the Bar to pass the examination which it imposed, exercise the right of rejecting or admitting such as passed the examinations, strike from the roll of practicing lawyers those whom it adjudged guilty of offense against its code of ethics or of morals, and finally, punish those who attempted to practice without first having obtained its permission. This, really, is a fair illustration of the relation the Incorporated Law Society bears to the solicitors of England and Wales. It will therefore be seen that the society is a thoroughly representative organization and that the views of its ruling members as expressed at its annual meetings are entitled to a great deal of consideration. The opening address of its president is not only awaited with interest by the members of the society, but it has wide circulation in the secular press and no little weight of authority among the general public, and particularly that other section of the legal profession — the Bar.

Thus far, Mr. Budd, the president, who is a busy commercial lawyer in London, followed a wide range of subjects in the hour and a half which the reading of his address occupied. While the majority of these possess but little interest for lawyers in America, there were, here and there, throughout the paper and the discussion which followed, incidents which may be entertaining as illustrating the differences which exist in practice in the two countries. For example, strong objection was urged against compulsory registration of titles to land! At present a system exist, by which titles may be registered if their owners so desire; and in the last Parliament the late Lord Chancellor introduced a bill to extend the operation of the law to all titles by making it compulsory. In America, where registration is complete and a title may quickly be searched from the records in any county town, there would seem to be no ground here for opposition to the proposed bill. Nevertheless there is opposition, and from some of the most eminent of the London solicitors, such as Mr. Hunter, the late president of the society, and Mr. B. G. Lake, who has had a good deal to do with American matters. Their contention appears to be that what is easily feasible for American communities is not conformable to the traditions and customs of the English people. Here a deed is a carefully prepared muniment of title. It is engrossed on a piece of parchment of four-times-foolscap dimensions, and it is preserved in a "strong box," along with all the similar instruments relating to the title. At every transfer of the land copies of these documents pass between solicitors, and the originals are inspected. A loss of any one of the deeds composing the chain of title would be almost irreparable, and, to say the least, very awkward. Still this system appears to be more favored than one where the record is kept under official supervision. Just what formality is now necessary is illustrated by the following question and answer I have taken from a favorite text-book for students preparing for the Bar examination. I may say that the question is one

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which was actually put on the paper by the examiners: —

"Q. A., owner in fee simple of land in Middlesex, agrees to sell it to B. A.'s grandfather purchased the land sixty years ago and gave it specifically by will to A.'s father, who died in 1854 intestate, leaving A. his only son. B. brings you the abstract of title showing the conveyance to A.'s grandfather, and the probate of his will, etc., and instruction to act on his behalf. State the requisition, which would appear necessary on the title as shown by the abstract.

"Ans. The following would be necessary: 1. Proof of the seisin of A.'s grandfather at the date of will and death, if made before 1838, but if made after, only at the time of his decease, and productive of probate. 2. Death of his widow, if any, unless dower barred. 3. Death of A.'s father intestate, also death of his widow, if any, unless dower barred. 4. Heirship of A. 5. Registration of all documents affecting the title. 6. Proof of payment of succession duty on A.'s succession. And as to proof of death of A.'s father intestate, and A.'s heirship, proof should be required of the marriage of A.'s parents, by marriage certificate; the birth of A. by baptismal certificate or certified extract from the register of births; the death of A.'s father by burial certificate, or certified extract from the registry of deaths; the intestacy by evidence that no will was ever proved or heard of, and finally, a statutory declaration would also be required from some person acquainted with the family, identifying the father and stating that A. was the eldest son of his father."

Who can say, after this, that the English solicitor, in opposing a system of compulsory registration of land titles, is not without a sense of humor?

A further topic upon which Mr. Budd dwelt with much emphasis was that of legal procedure, and, to the keen interest of both branches of the profession, he considered the reasons why for many years litigants have become more and more shy of resorting to the tribunal of the court for settling their disputes. His answer is that the present system of procedure does not satisfy the requirements of business men — it is far too complex, too dilatory and uncertain as to time, and too expensive for the requirements of business men in ordinary transactions at the end of the nineteenth century. As Mr. Budd is a commercial lawyer in the busiest part of the busy city of London, such an arraignment should have practical weight; and as a matter of fact it did have, for upon the very first opportunity the Lord Chief Justice took occasion to repel the charge that the courts are dilatory. In addressing the new Lord Mayor of London, the Chief Justice, in commenting upon the relation between the mercantile interests of the city and the law, said with respect to this complaint against litigation: "In recent experience it has occurred to one or other of my brothers to have set before them, for trial and to dispose of, cases which had only been instituted a week before, in some cases a month before, and in some cases even a shorter period than that. It is no longer also possible for a debtor who has got no answer to his creditor to keep a creditor at arm's length by resort to tedious and dilatory pleas. It is now within the power of the court, if it is satisfied that there is no real defence, to give to a creditor a judgment to which he is honestly entitled, and if there be any doubt about the question of a defence to require that security shall be given for the debt before the defence is entered upon."

It was intimated in this address of Mr. Budd's that of all the expenses to which litigants are put, that of counsel's fees are most onerous, and that while solicitors' charges are regulated by a fixed scale, established generations ago, barristers' fees have been constantly increased, until now they are out of all proportion to the other expenditures. He stated that while in theory the services of counsel are gratuitous and their fees are honoraria, theory has been left in the lurch by practice, and that in reality counsels' fees are bargained for by the clerks. Worst of all, the big men at the top of the profession take big fees and then either do not appear at the trial, or, if they do, they hurry into court, address a few remarks to the judge, or ask a few questions of witnesses, and then hurry out again, leaving the burden of the case to the juniors. This complaint of Mr. Budd's was backed up a few days after by a letter from an indignant solicitor, in which he told the story in "The Times" of his having marked a certain counsel's brief one hundred guineas, and the counsel did not appear at all. As a sequel to this appeal to the newspapers the counsel in question sent the fee back to the solicitor, although more than six months had elapsed since it had been given to him.

The other most important contribution to the thoughtful matters of the law was the formal address on the subject of legal education, delivered by the Lord Chief Justice to an audience of barristers, solicitors and law students, in Lincoln's Inn Hall at the beginning of the term. He, too, argued a higher qualification for the Bar, and advocated the establishment of a school of law which should be open not only to students for both branches of the profession, but to the public at large. His remark that he attributes to the lack of any comprehensive and scientific teaching of law the fact that our leading text-books and the decisions of the most distinguished English judges are unknown except in America, provoked a good deal of newspaper controversy, and elicited from Sir Frederick Pollock a very hearty tribute in "The Times" to the excellent work done by the Harvard Law School.

STUFF GOWN.

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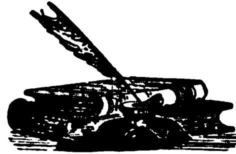
The Lawyer's Easy Chair.



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

.·. .·. .·. .·. .·. BY IRVING BROWNE. .·. .·. .·. .·. .·.

CURRENT TOPICS.

"DEGENERATION."—The most extraordinary book of the last decade, and the one that has called forth the greatest amount of criticism since the appearance of Darwin's "Origin of Species," is "Degeneration," by Dr. Max Nordau of Vienna. That it should have appeared almost simultaneously with Drummond's "Ascent of Man" has added to the interest which it has evoked, for as the purpose of the latter is to show the gradual elevation, so the purpose of the other is to show a tendency to degradation of a part at least of the human race. The criticism which this book has called forth has generally been hostile, mainly from the newspapers, and of a very severe and unsparing kind. It is probable that few of the critics have read the book or have grasped its purport, for they have assumed that the author argues a general degeneration, whereas in fact he asserts it of only a small part of the human race, influenced by the tone and teachings of a very small body of poets, novelists, musicians and philosophers. The book is a scientific one, based on the observations of a physician and alienist, and when considered in its real limitation to the peculiar and comparatively small classes of which it treats, it is an impregnable and wholesome work, one that was greatly needed in this era of fads and delusions, and one that breathes an invigorating and mist-dispelling spirit. If all the lunatics of whom Nordau treats were like the French poet who deems it indecent to publish, and has gained a considerable reputation thereby, there would be no need of this book; but unfortunately too many are like Nietzsche, who declares that publishing "is the only way in which he can get rid of his thoughts." (Sir Benjamin Backbite said, "'Tis very indecent to print.") The work is divided into chapters, headed "Fin-de-Siècle," "Mysticism," "Ego Mania," "Realism," and "The Twentieth Century." The author first demonstrates that all the grotesque nonsense and madness characterizing the classes of persons in question grow out of the lack of the ability to fix the attention on a single healthful thought or object and segregate it from a host of irrelevant and confusing ideas and images which simultaneously arise in the mind, and whence arises incoherency. This theory is very beautifully demonstrated, and it is one that ought to be emphasized by every instructor of youth. This power to fix the attention is that which distinguishes the man of intelligence from the rambler and driveller. The man of one idea is always a man of genius, though thoughtless people call him a crank. By "Ego Mania" Dr. Nordau means that modern tendency to convert the individual into his own sovereign, irrespective of and irresponsible to society or any obligation of virtue. The author specially dissects about a score of individuals, who have called themselves by various queer names — mystics, symbolists, pre-Raphaelites, Parnassians, realists, impressionists and esthetes, but whom he damns with three "big, big D's," as Decadents, Degenerates and Diabolists. Among novelists he treats of Baehr, Zola, Tolstoi, Péladin, and Tovote; among artists and art writers, of Ruskin and Rossetti; among dramatists, of Ibsen and Maeterlinck; among musicians, of Wagner; among prose writers, of Bourget, Brandes, Baudelaire, Gautier, Flaubert, Goncourt and Wilde; among poets, of Verlaine, Mendes, Rollinat, Whitman, Moveas and Mallarini. Most of these names are unfamiliar to the English reader, and are mainly French and German, but the author might well have added the American Poe; the English-American painter of "symphonies" in one or two colors, Whistler; and the French madman Maupassant. The larger part of his pages is devoted to Tolstoi, Wagner, Ibsen, Zola, Nietzsche, and a more unsparing, and on the whole a juster and more unanswerable dissection and denunciation does not exist in any language. What a world of madness, sensuality, eroticism, and "rot" it is that he exposes! Here we find true portraits of Zola, who wallows in the mire of crime and fornication, and who has converted the sense of smell into an avenue to sensuality; of Wagner, whose prodigious dramas are tales of murder and incest; of Rossetti, who painted thick-lipped, shock-headed women, with corpsey skins, whose drawing would have disgraced a school girl, and whose weird poems are infested with senseless refrains; of Ibsen, who is hailed by the modern woman,— invalid, discontented, ambitious, whose occupation is chiefly lying abed and yearning after a wider "sphere"— as the emancipator of her sex, but

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who really presents a dozen different notions of marriage; Tolstoi, a literal madman, who in "Anna Karenina" has given the natural history of a seduction, with one chapter descriptive of a lying-in scene, and in "The Kreutzer Sonata" has denounced marriage as filthy and vile, and on every page used expressions which ought to bar the book from decent society and and from public sale and libraries; Nietzsche, the German philosopher, who glorifies crime and is at last immured in a lunatic asylum.

These principally and many more subordinately Nordau exposes, dissects and denounces with an unsparing vigor and a terrible humor. Until one has read these pages one is ignorant of what a vast amount of degeneracy there is, and what a considerable following it has gained. When we see people gloating over the pages of men who are in lunatic asylums or prisons, or have died in madness, we cannot be too grateful to a scientific writer who has the ability and the courage to expose the evil and warn people against yielding to its influence. In truth, the vice of eroticism has gained such power in literature, that it is no longer safe to allow one's young son or daughter to read a recent novel without first scrutinizing its pages, and this is true of some of the most powerful of recent romances, such as "Tess," "The Manxman," "Trilby." What a falling off since the healthful tales of Scott, Dickens, Thackeray, and most of the elder school! The same thing is true of the modern drama — most of the reigning plays are full of immorality. There would not be much harm to the young in this if all the young women were as innocent as the female teacher of history in a seminary which we know of, who advised her history class of sixteen-year-old girls to read Dumas' "historical" novels! Fancy the historical improvement derivable from the adventures of Athos and Madame de Chevreuse and of D'Artagnan and Milady Clarik! There is one thing to be said however for the coarseness of Fielding, Smollett and Dumas — it is vigorous, and manly, not unnatural and debilitating, like that of the moderns, and does not tend to land men where Oscar Wilde has brought up. Until one reads these pages he is ignorant of the grotesque insanity of such a poor creature, for example, as Oscar Wilde, who despises nature; is doubtful of his own opinions when others agree with them; whose "ideal of life is inactivity"; and who gravely argues "that painters have changed the climate, that for the last ten years there have been fogs in London because the impressionists have painted fogs"! Or of the "philosophy" of Nietzsche, who argues that the original man was a "blonde beast," a solitary, roaming beast of prey, "whose fundamental instinct is cruelty"; who glorifies "the sovereign individual resembling himself alone," and denounces civilization as "the slave revolt in morality"; who remarks that "crime is calumniated, and that the defender of the criminal is oftenest not artist enough to turn the beautiful terribleness of the crime to the advantage of the doer"[1]; and whose favorite maxim is, "nothing is true, everything is permissible." Or of Baudelaire, who "sings of carrion, maladies, criminals and prostitutes," and died of paralysis. Some of us have listened to the unbridled passion, and to the half-hour incestuous love-duets in some of Wagner's operas, but we gain a new sense of their absurdity when Nordau says: "The lovers in his pieces behave like tom-cats gone mad, rolling in contortions and convulsions over a root of valerian. It is the love of those degenerates, who, in sexual transports, become like wild beasts." Some of us have heard and had vague ideas of Maeterlinck's poetical productions, but if one wants a perfectly correct idea of them let him read Nordau's parody of them, which is not a whit more ridiculous than the originals: "O Flowers! And we groan so heavily under the very old taxes! An hour-glass, at which the dog barks in May; and the strange envelope of the negro who has not slept. A grandmother who would eat oranges and could not write! Sailors in a balloon, but blue! blue! On the bridge this crocodile and the policeman with the swollen cheek beckons silently! Other soldiers in the cowhouse, and the razor is notched! But the chief prize they have not drawn. And on the lamp are ink spots!" We quite agree with Nordau, that Maeterlinck's style "has already reached the extreme limits of idiocy," and that it is not "quite worthy of a mentally sound man to make fun of a poor devil of an idiot." Yet in the October number of "The Bookman," a ruling magazine of literature, is the portrait of this writer, whose poetry is as above portrayed, and whose plays would have been better if written by one of Shakespeare's fools. Many of us have read some of Zola's novels, so steeped in vice, crime, and sensuality, but we get a strong ray of enlightenment when we read Nordau's assertion that he compresses all the vice, crime and sensuality of a generation and a wide district into the compass of a few persons, a small locality and a short time, and that "He has in reality seen nothing and observed nothing, but has drawn the idea of his *magnum opus*, all the details of his plan, all the characters of his twenty novels, solely from one printed source, remaining hitherto unknown to all his critics," namely, the history of a criminal French family of the name of Kerangal, which "in two generations has hitherto produced, to the knowledge of the authorities, seven murderers and murderesses, nine persons who have led an immoral life

[1] The eccentric English artist, Blake, said: "What one called the vices in the natural world are the highest sublimities in the spiritual world."

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(one the keeper of a disorderly house, one a prostitute, who was at the same time an incendiary, committed incest, and was condemned for a public outrage on modesty, etc.), and besides all these, a painter, a poet, an architect, an actress, several who were blind, and one musician." Some of the discontented wives who grovel at the feet of Ibsen would do well to read Nordau's opinion that their husbands would be only too glad to grant them "emancipation" if it were possible! It argues well for the healthful tone of American literature that Nordau finds no American for special condemnation but Whitman, whose "Leaves of Grass," and the admiration of it felt by his cult, are a national stigma. It is a book fit only for a rake or a Mormon.

We do not always find ourselves in agreement with the author. For example, we think he hardly does justice to Ruskin, although that eloquent writer has held all sorts of views of art, and is unquestionably intolerant and eccentric. In like manner, we think he hardly does justice to Wagner in blaming him for his lack of melody, when Wagner's theory is that vocal melody is out of place in dramatic music, and should be found only in the orchestra, which stands in the place of the ancient Greek chorus. It may well be questioned whether Wagner has not wrought a distinct benefit by practically banishing from the stage the tum-tum tunes in which the persons of the Italian opera have been wont to vent their emotions. At the same time, one must admire the ingenuity of Nordau's contention that Wagner's vocal score is essentially barbaric, and a reproduction of the prehistoric method of voicing emotions before mankind was capable of melody. We have heard warm admirers of Wagner admit that it does not make much difference what sounds the singers in the Wagner operas emit, whether they correspond with the score, or not! The writer feels some sympathy with Nordau about Wagner's "motives," or orchestral signals for emotion, which are much like bugle-calls in the army.[1]

And the most strenuous admirers of Wagner must find a relief, after hearing one of his overpowering dramas, in listening to the dignified strains of Beethoven, and his natural exclamation must be "How sane it is!"

As we have before observed, most of the mass of hostile criticism and violent denunciation which this book has evoked has come from the newspapers. It is amusing to note, in connection with this fact, that two of the principal objects of Nordau's condemnation, Ibsen and Nietzsche, hate and abuse the newspapers. Some criticism is made on Nordau because he seems not to allow any genius to the persons of whom he treats, and it is urged that genius is necessarily irregular, abnormal and in a measure insane. But it seems to us that the wholesome lesson that he teaches is, that while some geniuses approach madness, all madness is not genius, and attention is required to differentiate the sane from the insane utterances of extraordinary men.

This remarkable book will leave two distinct impressions on the mind of every lawyer who reads it: first, a feeling of self-congratulation that he belongs to a profession of eminently sane men and sane ideas, whose purpose is to ascertain truth and promote justice, and to cause the individual to recognize his subordination and pay his debt to society; second, that it would be infinitely unwise to relax the present general rule of mental and moral responsibility for crime, and allow a criminal to go free, who knew right from wrong, but pleaded the lack of will-power to restrain himself from doing the wrong. Nearly every one of these mentally diseased celebrities, of whom Nordau has treated, could get off from an accusation of crime on this score if the law were relaxed in conformity with the opinions of many modern physicians.

In conclusion, Dr. Nordau is not a pessimist. On the contrary, he is hopeful that all these diseased tendencies may be eradicated from the human mind by proper training and inculcation. He does not say, "'Tis a mad world, my masters," although he does demonstrate that there are many mad people in it who are esteemed by too many followers as the true prophets, the only "moderns."

[1] The writer gave vent to his feelings on this point as follows, when he was

AT BAYREUTH.

It is an ancient music man,
And he stoppeth one of three;
"By thy gray beard and glittering eyes,
Now what do you want of me?"

"Oh, I'm a Wagner maniac,"
He whispered in my ear,
"And my chief motive is to tell
To you the motives here.

"You see, you mustn't enjoy this thing
Unless somebody tells you how,
No matter how many times you've heard,
Or read about it, I trow.

"Your mind must be in a certain state,
Your brain must be somewhat dazed,
Your ear-drums must be fortified
And prepared to be amazed.

"Surrender all the old ideas
Of music under the moon,
And learn that the truest harmony is
When everything's out of tune."

He sat behind me at Parsifal,
He kneaded sore my spine,
He punched me when I ought to weep,
And when to sigh, "divine!"

But oh! how much I'd like to sink
Thee under Klingsor's wreck,
And bribe the manager to hang
That swan about thy neck!

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JUDICIAL ACTS. — We find the following floating around in the newspapers, purporting to be a discussion in court between "Dr. Andrews, the appellee before the court of appeal" in England, and Lord Esher, Master of the Rolls: —

"I submitted to the master of the rolls who was presiding: 'Then if your lordship were to order a policeman in court to bring up to you on the bench a man from the body of the court, and your lordship were then to strike the man in the face, would the striking be a judicial act?' And his lordship replied that it would be a judicial act. . . . . On August 7, reverting to the point your petitioner had submitted as to whether striking a man in the face would be a judicial act, Lord Esher said: 'If I were to order a barrister in court to sit down and he did not, and I shot at him and killed him, I much doubt if proceedings for murder would lie against me.'"

We can hardly believe that this is a correct report of what his lordship said. If it is, it is arrant nonsense. Judges have always leaned violently toward the maintenance of their immunity concerning anything they might do or say on the bench, seeking to cover all their acts with the cloak of judicial inviolability; but we never before heard of any judge's going so far as to claim that he might commit a felony with impunity while sitting on the bench in the trial of a cause. We had occasion some years ago to investigate this general subject very carefully, and the results may be found in a note, 25 Am. Rep. 694, and 29 ibid. 96. It is held that where a judge of a court of general jurisdiction has jurisdiction of a cause he is not civilly liable for anything he may do under guise of that jurisdiction, although he exceeds his jurisdiction. But there is no hint in the books, so far as we can discover, that a judge is not liable for a wanton and felonious act done on the trial of a cause, although he claims that it was done in furtherance of the proceedings. It will be difficult to find any sanction for a judge to do what is forbidden by the laws of God and man, and is clearly unnecessary, excessive, and malicious. The distinction between acts that are protected and those that are not may be illustrated thus: if a man were on trial for murder, and the penalty were only life imprisonment, and on conviction the judge should sentence him to death and he should be hanged, the judge would not be criminally liable, and he would not be civilly liable in damages, for the act would be simply an excess of jurisdiction; he had power to sentence him, and he simply exceeded his authority. He was in the exercise of a judicial act in passing sentence. But suppose at the close of the testimony, the judge should say: "I pronounce you guilty and sentence you to death," and should then pull out his "gun," and kill him, or should shoot him without sentencing him, he would be guilty of murder, for his act would not merely be in excess of jurisdiction, but would be without the guise of jurisdiction. No judge has power to punish without sentencing, nor to execute a sentence with his own hands. No judge has authority or guise of authority to slap a barrister's face for contempt, much less to kill him. No judge has authority to take a condemned prisoner out with his own hands and hang him. Lord Esher might as well contend that if he should order that woman, who has been vexing the English by her overmuch importunity in her own cause, to sit down, and she should refuse, and he should then commit a rape on her, this would be a "judicial act," and he could go free because he thought it was the only way to stop her mouth. Lord Esher, we fear, is feeling his judicial oats too much, and has become excited and uttered nonsense. His "doubt" in this matter is not entitled to the respect given to Lord Chancellor Eldon's "doubts."

LAW-BOOK EDITING. — For *naïveté* or coolness, nothing can surpass the views which Mr. G. Pitt Lewis, Q. C., appears to entertain of the function of a law-book editor, according to the *London Law Journal*. This gentleman, it seems, has issued a new edition of Taylor on Evidence, in the preface of which he says:

"A further large saving in this direction [*i. e.* of space] has been made by remorselessly pruning all exuberance of expression, even sometimes, it may be, at a sacrifice of style and rhetorical effect. Some editors, indeed, consider the text of their author to be so absolutely sacred that not a word of it ought to be touched. The present editor, however, thinks that the true duty of the editor of a law-book is to strive his best to render the work which he is editing one that the author would have produced, writing at the present day; and that in carrying out his task, the editor of such a book must be bold, and must not shrink from responsibility."

We disagree with the editor of the *Law Journal*, who says of this passage: —

"This view has much to be said in its favor, and he who in editing a book not only notes up, but also cuts out, is worthy of praise."

We think that there is nothing to be said in its favor, and that such editing of celebrated legal treatises deserves the strongest reprehension. Pray who has given to Mr. G. Pitt Lewis, Q. C., to know how Judge Taylor would have written if he had fortunately survived to this time? Who made him a judge of "exuberance"? What right has he to "monkey" with Taylor's rhetoric? If he wants to write a dull and common-place book, let him do it without evasion or saddling his notions on Taylor. An editor in this country who should presume remorselessly to prune the exuberance of Story, or alter Kent or Greenleaf to his own idea of what they would have

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written if they had lived, would meet with very slight encouragement. "The judicious Mr. Bowdler" once edited and expurgated Shakespeare, designed for the Young Person, but it received contempt and ridicule. Mr. Howells would perhaps like to adapt Sir Walter Scott's novels to his own pattern of kitchen photography, but however great may be the demand for Scott or Howells, there is none for Howells-Scott. There is, and long will be, a demand for Taylor on Evidence, and perhaps there may spring up a demand for Lewis on Evidence, but we cannot imagine that there will be any, at least in this country, for Lewis-Taylor. We prefer our Taylor "straight," and sympathize with the *Law Journal* in the "regret" that "must be felt that the original sentences in Judge Taylor's book have commenced to suffer effacement."

ASSAULTS ON JUDGES. — The *Law Journal* says: "The only modern instance of a judge of the High Court being assaulted on the bench is afforded by the reckless act of the American who threw an egg at Vice-Chancellor Malins — an offence for which he was kept in prison for six months, at the end of which period he was placed on board a ship bound for New York." That was simply a motion for a new trial *ab ovo*.

NOTES OF CASES.

THE STATUE CASE. — A completely novel question of law was raised in Schuyler *v.* Curtis, 64 Hun. This was an action for an injunction brought by a nephew and stepson of Mrs. Mary A. Hamilton Schuyler, deceased, to prevent the procuring by subscriptions, and the exhibition, at the late Chicago Exposition, of a statue of the deceased woman, by an association known as "The Woman's Memorial Fund," and to be designated "The Typical Philanthropist." The defendant's design also embraced a statue of Miss Anthony as "The Representative Reformer." The deceased was not a public person. An injunction was issued, and this was sustained by the general term of the Supreme Court, Chief Judge Van Brunt denouncing the project as an "audacious claim," unprecedented in the law, and declaring that to sustain it would make "a blot" upon our jurisprudence. He went the length of saying that no person, public or private, could be subjected, living or dead, to this compulsory form of portraiture. But this doctrine is now reversed by the Court of Appeals, Judge Peckham giving the opinion. The substantial ground of the decision is contained in the following extract: —

"Whatever the rights of a relative may be, they are not, in such a case as this, rights which once belonged to the deceased, and which a relative can enforce in her behalf and in a mere representative capacity, as, for instance, an executor or administrator, in regard to the assets of a deceased. It is not a question of what right of privacy Mrs. Schuyler had in her lifetime. The plaintiff does not represent that right. Whatever right of privacy Mrs. Schuyler had died with her. Death deprives us of all rights in the legal sense of that term, and, when Mrs. Schuyler died, her own individual right of privacy, whatever it may have been, expired at the same time. The right which survived (however extensive or limited) was a right pertaining to the living only. It is the right of privacy of the living which it is sought to enforce here. That right may, in some cases, be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living and not that of the dead which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased."

Judge Peckham regards the plaintiffs' contention as "wholly fanciful," and the proposed exhibition "not such as might be regarded by reasonable and healthy minds as in the slightest degree distressing or tending in the least to any injury to those feelings of respect and tenderness for the memory of the dead which most of us possess, and which ought to be considered as a proper subject of recognition and protection by civilized courts."

He admits, *obiter*, that such a project in Mrs. Schuyler's lifetime would, "perhaps," have been an unjustifiable "violation of her individual right of privacy." He thinks that no violence would be done to anybody's legal rights by the exhibition of the statue with that of Miss Anthony, and pays the latter woman a very high compliment (which is also *obiter*). He scouts the argument that the statue would not be a likeness because there is no extant portrait or other means from which to copy. He deprecates the inference that under the decision "the feelings of relatives or friends may be outraged or the memory of a deceased person degraded with impunity by any person who may thus desire to affect the living. The rights of such persons will remain the same after as they were before our present decision and will be wholly unaffected by it. We simply say that in this case the defendants have proposed to do nothing which ought to affect unpleasantly the mental condition of any sound, reasonable and intelligent man or woman, and therefore an injunction ought to have been refused."

Judge Gray dissents very strenuously, and is of opinion that the family of a dead lady who was so retiring that she left no likeness of herself, had a right to object to a notoriety forced upon her memory and upon them. He observes: "I cannot see why the right of privacy is not a form of property, as much as is the right of complete immunity of one's

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person. If it is a property right with reference to the publication of a catalogue of private etchings and entitled to be protected against invasion,' as Lord Cottenham held in Prince Albert *v.* Strange (1 Macn. & G., 25, 47), why is it not such with reference to name and reputation?"

Here then is a very nice question, which might be decided either way without doing violence to rules of law, and which depends wholly upon the discretion of the tribunal addressed. It depends upon the size of the chancellor's foot. Chief Judge Van Brunt and Judge Peckham differ very widely in their notions of the right of privacy, and where such men differ, it would be unbecoming to express any *ex cathedra* opinion either way, but we must say that our sympathies are with the family, and that we prefer the views of the general term and of Judge Gray. No member of the celebrated families of Hamilton and Schuyler would object to the commemoration of their great ancestors of Revolutionary fame by public effigies. Probably Mr. Schuyler was unduly exercised in this case, for we do not believe the requisite subscriptions could have been obtained to pay for the statue — unless it was a very cheap and bad one. The decision also has lost all significance, except as a precedent, for the Fair is a thing of the past. We do not object to such commemoration of public persons. The senior Judge Peckham's portrait hangs on the wall of the court room where his son now sits, and his son's will some time hang there, and the son will not object to either, nor to having his own some time in the Supreme Court Chamber at Washington. But there is a sense of fitness and propriety about this matter which we miss in this decision — a want of sensibility. We hazard the guess that if the proposal had been to show at the Chicago Fair a statue of a female relative of Judge Peckham, it would have come to him in a different measure, and that some high language would have been held and some strenuous opposition displayed. It makes a great difference whose ox is gored. And now we find we have written ourselves up to such a strain that we are willing to say that we consider the proposal of the defendants to have been exceedingly unjustifiable and impudent, not only in its conception, but in the obstinate determination displayed. If loud-mouthed women want to pay statuesque and posthumous compliments to some other woman, let them select some one who would have been willing if living, and whose family are willing when she is dead

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NAPOLEON WAGERS. — *Apropos* of Mr. Jenkins' account of the wager case about Napoleon, Phillips *v.* Ives, 1 Rawle, 36, in the December GREEN BAG, Gilbert *v.* Sykes, 16 East, 150, not mentioned by Mr. Jenkins nor cited by the Pennsylvania court, attention may usefully be called to an English case, which involved a wager about Napoleon and was decided in 1812, sixteen years earlier than the Pennsylvania case. The defendant received one hundred guineas on the 31st of May, 1802, in consideration that he should pay the plaintiff a guinea a day so long as Napoleon, then First Consul, should live, the bet arising out of a conversation upon the probability of his coming to a violent death by assassination or otherwise. This was held void on grounds of immorality and impolicy. The bet was made at a time when Napoleon's life was in constant danger from conspiracies formed or fomented in England, and when the Bourbons maintained sixty paid assassins in Paris. Napoleon put a stop to this enterprise by his summary execution of the Duc d'Enghien. The defendant paid his guinea daily until December 25, 1804, when he stopped. The plaintiff claimed £2296. It appeared that the bet arose at dinner at the defendant's table, that it was not intended seriously, and that although the plaintiff offered to cancel it, the defendant stuck to it out of a sense of honor. Having expended about thirty-three hundred dollars in vindication of his honor, he began to take counsel of Falstaff about the value of honor, and concluded that he had paid enough. The jury found in his favor. Lord Ellenborough gave heed to the suggestion that the bet was impolitic because it gave the plaintiff an interest in the life of a foreign sovereign and enemy. He dwelt on Napoleon's hostile demonstration against England on the opposite shore of the Channel, at Boulogne, and alluded to the fact that "every Sunday the minds of the subjects are kept alive to the danger"; and he demanded to know if "the loss of 365 guineas a year depending on that life would have no operation on his mind when opposed to the call of active duty toward his country," and at the same time he declared that it would be "an object to us to prevent even the suspicion and to repel from us the malignant imputation that we countenance in any manner the idea of assassinating an enemy, and thereby guard against any attempt on his part to retaliate upon a life most dear to us all." (The king, to wit.) Certainly this was a double-edged and diabolical wager — binding the plaintiff to neglect his patriotic duty to kill Napoleon, and binding the defendant to kill him in order to end his obligation to pay. Our private impression is that Ellenborough was nervous lest he should be called out in arms to resist the Little Corporal, for he was turned out of the awkward squad of the Lincoln Inn soldiery, on account of incorrigible unfitness for military affairs. (See Browne's "Humorous Phases of the Law," article, "Wagers.")

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The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor,
HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

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

THE GREEN BAG.

EDITOR OF THE GREEN BAG:—

The recent case of the people of the state of New York against Langerman, in which Barbara Aub, the complainant, testified falsely against the defendant, whom she accused of rape committed upon herself, not only aroused public interest to a degree amounting to excitement, but it also upset the commonly received theory that cross examination, if skillfully conducted, is competent to detect and expose perjury.

Perjury is practiced, as a matter of fact, by witnesses during nearly all trials, whether civil or criminal. Nearly every action at law involves the lie direct. One of the parties states what is not true, and swears to it. The jury believes one of the litigants because it cannot believe both, and the credence is always rather comparative or relative than absolute. David said in his haste, "all men are liars"; and the Scotch minister remarked after he had read this text, that in his parish the Psalmist might have said the same thing at his leisure.

Nothing is easier than for a person of moderate intelligence and a good deal of cunning to concoct a narration of some transaction which is alleged to have taken place between him or her and some other person, without other witnesses, that may be wholly false, and yet may be so diligently rehearsed beforehand as to be adhered to on the witness stand, and not shaken by any cross-examination whatever. All that is required at the trial on the part of such a witness is a good memory, and sufficient nerve to rely upon its resources.

In the case of the people against Langerman, the conscience of the perjured witness woke up in time to save the victim of the crime. Usually such spasms of virtue are stifled, occasionally they operate half way, as in a case that happened to my knowledge a few years ago in the city of New York.

A and B transacted some business together, which did not result to A's satisfaction. This was not the fault of B. But since B declined to undo the bargain, A went before a police justice and secured a warrant against B on a charge of larceny (constructive). Cross-examined by B's counsel before the magistrate, A, having sworn to a false narrative, withstood all attempts to pick flaws in it, his story being short, plain and decisive; and although B denied the charge he was duly committed, and the Grand Jury found an indictment against him. Meantime the conscience of the complainant stirred within him to this extent: that he refused to testify against B at general sessions, by keeping out of the way in a neighboring State until the indictment was dismissed; which being for misdemeanor only (petty larceny), could not be revived. After this, in a civil action, brought by B against other parties, connected with the same transaction, A appeared and repeated his original story on the witness stand, where it could do no other than a pecuniary damage. No cross-examination could shake his memory.

Q. E. D. That conscience, while it may shrink from letting its possessor swear an innocent man into prison, may, and constantly does, lose its grip in civil suits.

"The longer I live," once said an able judge to the writer, "the less confidence I place in human testimony."

CHAMPION BISSELL.

New York.

LEGAL ANTIQUITIES.

IT seems that an express law was necessary to prevent the fair sex from attempting to plead in the Roman Courts of Law; for Ulpian in his treatise *Ad Edictum*, tells us that the praetor

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prohibited them from pleading the causes of others, "that they might not intermeddle in such matters, contrary to the modesty befitting their sex, nor engage in employments proper to men." An exception, however, was made in favor of women whose fathers were prevented from conducting their own suits, owing to sickness or infirmity, and who could not get anyone else to plead for them.

FACETIÆ.

MANY years ago, in Virginia, a case was on trial in which the defendant was accused of shooting into a party that had come to "horn" him, a form of country celebration common at that time. Dennis Keeny appeared for the defendant. It was shown that the gun with which the shooting was done was loaded with dried peas instead of lead. Finally a very dirty-looking witness was called, and testified that he had been shot in the right leg. On cross-examination the fellow appeared rather shifty, and finally Keeny asked him to show the jury the exact spot where the pea took effect. The fellow demurred, saying that the shooting had been done six weeks before, and the wound had healed. At last, with great reluctance, the witness drew up his right trouser-leg, exposing a limb well covered with dirt. Pointing to a spot which, if possible, was blacker than the rest, the witness said: —

"There; that's where they went in."

Keeny turned to the jury, and in his most impressive manner said: —

"Gentlemen, I leave it to your knowledge of crops; if peas had been planted in that soil six weeks ago they would be in blossom now."

The witness retired in confusion, and Keeny won his case.

AT a public dinner in Philadelphia, some years ago, the presiding officer, with a cigar in hand, asked Mr. Evarts for a match, meaning that that gentleman should hand to him the box just beyond on the table. When Mr. Evarts said, "I have none," the presiding officer rejoined, "Very well, I shall have to introduce you as the matchless orator from New York." And yet some people say that Philadelphia is "slow."

THERE were two young fellows of Salem
To whom letters were given — to mail 'em.
They purloined the contents,
About thirty-two cents:
It took five hundred dollars to bail 'em.

IN North Carolina last year the Republicans elected some of their judges for the first time in over twenty years, and one of that party was so delighted that when Judge Robinson, one of the new judges, came to hold court, he put on a new suit, including a new pair of shoes, and went to the court house to "see a Republican judge on the bench." He began at the door and his shoes went *creak, creakety, creak* all the way down till he got near the Judge to get a good view and feast his eyes on the novel sight. The Judge stopped and eyed him, the proceedings stopped, all eyes were fixed on the newcomer with the creaking shoes, whose nervousness and the sudden stillness made the creaking seem louder than ever. When the owner of the shoes had about reached a vacant seat, the judge stormed at him: "Sit down there, "*shoes and all*." There is now one man in that county who no longer hankers to "see a Republican Judge on the bench."

A PRINTED brief of a Baltimore lawyer, in a case involving the meaning of the Geneva award legislation, contains the following: —

"Such a thing as one of the Great Powers of the world providing a bounty for the subjects of another Nationality is quite in advance of any type of civilization to which the Nations have yet attained; it is worthy of remark, however, that for the Nation to take care of its own citizens and award a suitable bounty to the individual citizen, or to whole classes of its citizens, in fit emergencies, is just the thing that great civilized States do do."

Some wag has written on the margin "I thought the 'do do' was extinct: but here he appears."

NOTES.

SOMEONE remarking to Chauncey Depew while discussing a recently decided railway controversy that the court was "only a toss-up one," the witty lawyer said dryly, "Perhaps so, but I notice that in it heads always win."

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A CERTAIN solicitor-general of England visited Berlin on a vacation, and being mistaken for bearing a military title was invited to a review and mounted on a charger. Being accustomed to following the hounds, he made an excellent equestrian, but when asked opinions as to some of the manœuvres was obliged to parry the cross-examination. A similar incident befell the late Marshall Bidwell, an eminent New York lawyer, in the fifties, who visited Paris in long vacation. Presenting his card at the gate of the Tuileries, he was politely informed that the emperor was at a review and if he desired a dragoon should be detailed to accompany him on horseback to the Champs de Mars. "But I am not a soldier," said the old lawyer. "Not a soldier and a marshall (examining the card), what a droll country is America."

THE long litigated Mora *cause célèbre* in legal as well as diplomatic courts is referred to as a tedious controversy, but what is it or the fanciful Jarndyce case to the famous Berkeley peerage, one that lasted within a fractional time of two full centuries — beginning with process running in the reign of Henry V (1416), and ending with decree running in the name of James I (1609). The suit was often diversified with combats at arms among the excited claimants and respondents.

IT is recorded of Andrew Johnson that when, senator or president, he was invited to a dinner party, he was accustomed to ask if any lawyer was to be among the guests. For said he, lawyers always lubricate things. He took a greater fancy to Wm M. Evarts, his Attorney-General, because of his post-prandial fame, than because of his eminent legal attainments.

AMERICANS visiting London are apt to go through, as one of its sights, the Coram Foundling Hospital, between Brunswick and Mecklenburg Squares, where they are struck with the apparent incongruity of finding in its chapel the grave of Lord Tenterden. The tablet quaintly recites "born in humble station of a father who was prudent and a mother who was pious."

IT seldom happens that an appellate court rebukes a litigant, but at a term of the Court of Common Pleas in New York City, Judge Roger A. Pryor, delivering the opinion on a mandamus to compel the Police Board to restore a captain, who had, while ill in bed at his home, been dismissed upon evidence taken in his absence, substantially remarked, "The law says he was entitled to a hearing. A hearing means trial. The only trial had in this case has been one of stupidity on the part of the tryers and a trial of our judicial nerves in contemplating such an outrage on law and justice." One of the Police Board — a lawyer — had, however, protested at the time of the dismissal. There is thus an authoritative decision as to the meaning of the word "hearing" sometimes loosely employed.

THE New Year inaugurates a great change of court procedure and jurisdiction in New York City, when, as "the year is dying in the night," perish the Courts of Common Pleas and the Superior Court, after an existence together of three score years and ten, leaving behind them an honorable career for a long line of judges, which include such jurists as Charles P. Daly, John Duer, Aaron Vanderpoel and Edward Pierrepoint. By the new State Constitution, the judges now of those courts are, so to speak, incarnated into the Supreme Court, and to the end of their present terms become Supreme Court judges of the district that the city completes. This action is taken from the precedent set by Lord Campbell's acts in England that amalgamated Queen's Bench, Common Pleas, and Exchequer Courts into one Supreme Court of Judicature with divisions. The New York new procedure also follows the English precedent by providing one standing Appellate division and leaving other Crown judges to assignment at chambers and trial terms.

LITERARY NOTICES.

Two very important facts in connection with the new era of magazines are illustrated in the December COSMOPOLITAN. Its fiction is by Stevenson, the last story written before his death, "Ouida," Sarah Grand, Zangwill, and the beginning of James Lane Allen's new Kentucky realistic story, "Butterflies." Probably no stronger array of fiction has ever been presented in any magazine. Nor has any magazine ever had a larger number of really distinguished artists engaged upon the illustration of a single number.

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HON. DAVID A. WELLS, in APPLETON'S POPULAR SCIENCE MONTHLY for December, follows the introductory paper of his series on Principles of Taxation with a very readable and instructive account of "The Comparative Recent Tax Experiences of the Federal Government of the United States." In one of the illustrated articles of this number, Prof. G. Frederick Wright presents "New Evidence of Glacial Man in Ohio," which consists in the finding of a stone knife imbedded in glacial gravel near Steubenville. Prof. James Sully shows us childhood "On the Side of Law," giving much evidence of an instinct for order and regularity in the child. Herbert Spencer continues his series on "Professional Institutions" by tracing the evolution of the teacher from the priest, and throws much light upon clerical control of secular education. Prof. W. R. Newbold contributes a psychological study of "Suggestibility, Automatism, and Kindred Phenomena." The Dean of Montreal writes on "Sir John Lubbock and the Religion of Savages," accusing the distinguished scientist of selecting quotations unfairly and ignoring recent evidence on the religiousness of barbarous tribes.

IN the December SCRIBNER'S MAGAZINE, Frank R. Stockton has a Christmas love-story, which bears a characteristic title, "The Staying Power of Sir Rohan." Its illustrations are quaint and exactly suitable. A thrilling detective story by C. E. Carryll, entitled "The River Syndicate," perhaps equaling Sherlock Holmes' best work, illustrated. Joel Chandler Harris' characteristic tale of a faithful slave, "The Colonel's Nigger-Dog." Other Christmas stories are: "A White Blot," by Henry Van Dyke, a poetic and imaginative tale of a picture (illustrated); "Heroism of Landers," by A. S. Pier (illustrated); and "Hopper's Old Man," by R. C. V. Meyers.

SEVERAL notable improvements have been introduced in the Popular Science Monthly, henceforth to be known as APPLETONS' POPULAR SCIENCE MONTHLY, with the beginning of the current volume. Wider margins have been adopted, the departments have been rearranged and given a less formal style, and many new attractions are promised. In response to numerous demands, the publication of the magazine simultaneously in this country and in England has been begun. The new volume opens with a list of writers, including David A. Wells, Fitzgerald Marriott, Daniel G. Brinton, E. P. Evans, James Sully, G. Frederick Wright and the Dean of Montreal, which should win it many new friends both at home and abroad.

THE Christmas CENTURY is notable both pictorially and for its literature. Perhaps the most striking and novel illustrations are those by Tissot from his well-known series, "The Life of Christ." The article on this extraordinary work is written by Miss Edith Coues. Another set of interesting illustrations is by Louis Loeb, the American artist, accompanying an article on "The Passion-Play at Vorder-Thiersee." Vibert's well-known picture, "The Grasshopper and the Ant," is reproduced in the series of pictures now running in THE CENTURY by this distinguished French artist. A little story by the artist accompanies the reproduction of the painting. This number gives the opening chapters of a story called "Tom Grogan," by F. Hopkinson Smith, with pictures by Mr. Reinhart. A real old-fashioned Christmas story by Stockton is entitled "Captain Eli's Best Ear." Among the short stories, however, none will attract more attention than Rudyard Kipling's "The Brushwood Boy," accompanied by a dreamland map.

AMONG the eminent thinkers who contribute to the one hundred and seventy-six pages which go to make up the body of the December ARENA, are Prof. Richard T. Ely, Justice Walter Clark, LL.D., Rev. Minot J. Savage, Rev. Edward Everett Hale, Frank B. Sanborn, Rev. John W. Chadwick, Henry Gaullieur, Prof. George D. Herron, Prof. Frank Parsons, Prof. Joseph Rhodes Buchanan, Helen H. Gardener, and Will Allen Dromgoole. The last named opens a serial of Tennessee life, which promises to be intensely interesting, and which will run during the next six issues.

OF several new stories of Lincoln told in the second installment of the new "Life of Lincoln," in MCCLURE'S MAGAZINE for December, one of the most interesting is that, when Lincoln removed with his family from Indiana to Illinois, he made thrifty use of the opportunities of the journey to peddle out, at a good profit, a stock of small wares which he had bought for the purpose. The whole installment is rich in picturesque details, and in Lincoln, as he undertook life on his own account, first as a flatboatman, and then as a grocery clerk at New Salem, exhibits a young genius and hero, doing wonderful feats of strength, risking his life to save comrades from drowning, and magically winning his way in a new community by his rare integrity, his superior intelligence, and his gift of entertaining speech. Along with the paper are twenty-five pictures, including a facsimile of Lincoln's first vote, portraits of him in 1856, 1857, 1858, and 1860, portraits of his early associates, and pictures of all the important scenes of this period of his life.

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Conspicuous among the contents of the December Atlantic is another of John Fiske's historical studies. It has for a title "The Starving Time in Old Virginia," and is an important historical contribution as well as delightful reading. This issue also contains three short stories: "Witchcraft," by L. Dougall; "The End of the Terror," by Robert Wilson; and "Dorothy," by Harriet Lewis Bradley. There are further chapters in Gilbert Parker's powerful serial, "The Seats of the Mighty," and two poems of exceptional quality, the "Song of a Shepherd-Boy at Bethlehem," by Josephine Preston Peabody, and "The Hamadryad," by Edward A. Uffington Valentine.

Littell's Living Age for 1896. The announcement of a reduction in the price of this famous eclectic, from *eight* dollars to *six* dollars a year, will prove of more than usual interest to lovers of choice literature. Founded in 1844, it will soon enter its fifty-third year of a continuous and successful career seldom equaled.

This standard weekly is the oldest, as it is the best, concentration of choice periodical literature printed in this country. Those who desire a thorough compendium of all that is admirable and noteworthy in the literary world will be spared the trouble of wading through the sea of reviews and magazines published abroad; for they will find the essence of all compacted and concentrated here. It brings together between its own covers the choicest current productions of the most brilliant writers, the best scholars, the most profound thinkers of the world.

BOOK NOTICES.

LAW.

General Digest of the Decisions of the Principal Courts in the United States, England and Canada. Annual, being Vol. X of the series. (Covering the year ending September, 1895.) The Lawyer's Co-operative Publishing Co., Rochester, N. Y., 1895. Law Sheep, $6.00.

The reputation of this Digest for accuracy and exhaustiveness is fully established, and it is high praise to say, which we do heartily, that the present volume is in every way the equal of those which have preceded it. No lawyer can well do without it.

Res Judicata. A treatise on the law of former Adjudication. By John M. Van Fleet. The Bowen-Merrill Co., Indianapolis and Kansas City, 1895. Two vols. Law sheep. $12.00 *net.*

Through his work on "Collateral Attack," Mr. Van Fleet is already favorably known to the profession, and this present treatise will add to his reputation. The subject of "Res Judicata" is fully and exhaustively discussed, and the work displays a vast amount of research on the author's part. From a careful examination of its pages, we can accord the work the most hearty praise, and can recommend it to the profession as a trustworthy and valuable addition to our legal text-books.

The Principles of Equity and Equity Pleading. By Elias Merwin, late of the Boston Bar. Edited by H. C. Merwin. Houghton, Mifflin & Co., Boston and New York, 1895. Law Sheep, $6.00 *net.*

A series of lectures delivered before the Law School of Boston University are embodied in this volume, to which have been added extensive notes by the editor. No better authority on the principles of equity than the late Mr. Merwin could be found, and this treatise very fully and exhaustively covers the subject. While an excellent working tool for the practicing lawyer, it is admirably adapted to the student's needs. Indeed, for a thorough grounding in the principles of equity it excels any work we have examined.

Select Cases on Code Pleading. With Notes. By Austin Abbott, LL. D. The Diossy Law Book Co., New York, 1895. Law Sheep, $5.50 *net.*

In this volume Mr. Abbott has collected all the leading authorities on the proper manner of pleading in both legal and equitable actions under the Codes.

The object of this volume is twofold: first to present the most useful collection possible, within the limits of a single volume, of the best authorities for practical guidance in the preparation of pleadings or the testing of the adversary's pleadings, together with copious analytical tables and indices to enable the reader at once to find whatever bears on any question of pleading he might have in hand. Second, to arrange these selected cases and annotatations in such a systematic method that the reader who takes up the volume for the purpose of surveying the method of code pleading and familiarizing himself with a view of its various parts in their connection and relation to each other will find an orderly development of its rules illustrating the distinction between evidence which is not to be alleged, and conclusions, which it is not sufficient to allege, and the substantive facts constituting the cause of action or defense which must be alleged.

The faithful and conscientious manner in which

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Mr. Abbott always works is a guarantee that all that comes from his pen can be implicitly relied upon.

American Negligence Cases, Vol. I. A complete collection of all reported negligence cases decided in the United States Supreme Court, the United States Circuit Court of Appeals, all the United States Circuit and District Courts, and the Courts of last resort of the States and Territories, from the earliest times, with selections from the Intermediate Courts, topically arranged with notes of English cases and annotations. Prepared and edited by T. F. Hamilton, of the New York Bar. Remick, Schilling & Co., New York, 1895. Law sheep. $6.50 per vol.

This volume is the first of a series which promises to be of great value to the legal profession. Negligence is one of the most important branches of the law, and one upon which every lawyer is constantly obliged to give an opinion. The object of this work is to enable him so to do with the least possible trouble. The plan of the publication is somewhat novel. We may briefly note some of its more important features:—

1. The method of collecting together all the cases decided in the various States and Federal Courts on a special subject, arranged by topics, and in addition thereto grouped under each topic so as to bring cases involving similar facts together. This appears to be a very convenient and sensible method of classification. 2. The index is such that the searcher will not be annoyed by numerous cross-references, but under the proper heads he will be directed to the particular case or cases. 3. The table of cases classified according to the facts, which precedes the index, will be of great assistance. The idea is, that the lawyer can turn to it after he has made his search, and at a glance verify his examination and be informed as to the cases overlooked by him. This table, in connection with the index, will greatly assist and make his work comparatively easy. 4. The method of examining the cases by the editor appears to be excellent. Each volume of reports has been examined — book by book — in order that defects of the many different classifications in the digests may not mislead. 5. It has been the purpose of the editor, in the "Notes of English Cases," to give briefly the facts contained in these cases.

Volume I covers "Animals," "Bailor and Bailee," and "Carrier of Persons." The work is in every way worthy the careful examination of every lawyer, and we doubt not will meet with all the success that the publishers hope for.

A Treatise on the Law of Real Property. By James M. Kerr. Banks & Brothers, New York and Albany, 1895. Three volumes. Law sheep. $16.00 *net.*

This is, perhaps, the fullest and most comprehensive work on Real Property yet offered to the profession. Mr. Kerr has done much good work heretofore, but this treatise is, in our opinion, the best he has given us. The arrangement of the work is admirable, and the busy lawyer, will, as the author says, find the work of "running down" a subject, or preparing a brief, materially facilitated. Good paper and large and distinct type are pleasant features to notice and are especially welcome. We heartily commend Mr. Kerr's latest venture to our legal brethren, who will will not be slow to acknowledge its merits.

MISCELLANEOUS.

The Century Magazine, Vol. 1. New Series, Vol. XXVIII. (May, 1895, to Oct., 1895.) The Century Co., New York. Gilt cloth. $3.00.

Although the "Century" has attained what might be termed a ripe old age, there is no sign of any decadence of its vital power, and the fiftieth volume comes filled with matter of the highest order. History, biography, art and science have adequate treatment, as well as fiction and the lighter things. Perhaps the most notable feature of the volume is Professor William M. Sloane's "Life of Napoleon," which reaches the most exciting portion of the great conqueror's career. There is a profusion of illustrations, including not only reproductions of famous masterpieces of painting, but also many drawings made for the work by French, English and American artists. A paper that has attracted wide attention all over the world is "The Battle of the Yalu," by Philo N. McGiffen. Commander McGiffen, who was in charge of the Chinese warship *Chen Yuen*, is the first representative of western civilization to take part in a naval engagement between vessels armed with modern guns and equipments. Max Nordau is represented by a "Lively Answer to My Critics," while Professor Cesare Lombroso discusses the value and the errors of Nordau's "Degeneration," which was dedicated to him. In the line of fiction there are the closing portions of Marion Crawford's "Casa Braccio," the whole of Julia Magruder's "Princess Sonia," and many short stories by favorite writers. There is much in the volume that one needs in his library for permanent reference.

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THE CUP OF TREMBLING, and other stories. By MARY HALLOCK FOOTE. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.25.

Whatever comes from Mrs. Foote's pen is sure to be worth reading, and the four stories which make up this volume are all of more than usual interest. There is a freshness and originality to them which make them a delightful addition to the short-story literature of the day.

THE KING'S PEACE. A historical sketch of the English Law Courts. By F. A. INDERWICK, Q. C. Macmillan & Co., New York, 1895. Cloth. $1.50.

In this compact little volume Mr. Inderwick gives an exceedingly interesting account of the English Law Courts, from the time of Alfred the Great to the present day. The book will delight the lawyer, the antiquarian and the layman. It is written in a pleasing style, and imparts many valuable facts connected with England's legal history. The illustrations, mostly taken from quaint old cuts, add much to the value of the book.

IN A HOLLOW OF THE HILLS. By BRET HARTE. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.25.

This is a story of Californian life in the old mining days. The incidents are extremely dramatic and are depicted in Bret Harte's inimitable style. No writer has a keener sense of humor and pathos, and his quaint method of expression invests his works with an unusual charm and fascination, "In a Hollow of the Hills" will rank with the best efforts of his pen.

A VICTORIAN ANTHOLOGY. 1837–1895. Edited by EDMUND CLARENCE STEDMAN. Houghton, Mifflin & Co., Boston and New York. Cloth. $2.50.

No one is more admirably fitted than Mr. Stedman for the preparation of such a work as this, and his selections from the Victorian poets will meet with general approval. While one may, perhaps, miss a favorite poem and wonder why it has not been included in the compilation, still, taken as a whole, it is doubtful if a better and more representative choice could have been made. The biographical notes are valuable and useful, and the indexes of titles and first lines are of great assistance. This anthology is designed as a supplement to the author's "Victorian Poets."

THE MYSTERY OF WITCH-FACE MOUNTAIN, and other Stories. By Charles Egbert Craddock. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.25.

Miss Murfree is always sure of hearty welcome for anything she writes, and the three stories which make up the contents of this volume will endear her more than ever to her readers. The Tennessee mountains, as usual, form the back-ground of these sketches, and both scenes and characters are portrayed with the author's evident love for place and people whereof she writes. Besides the title-story the contents include: "Taking the Blue Ribbon at the County Fair," and "The Casting Vote."

ST. NICHOLAS MAGAZINE. Vol. XXII. (Nov., 1894, to Oct., 1895). Conducted by MARY MAPES DODGE. The Century Co., New York. In two parts, bound in red and gilt cloth. $4.00.

If the boys and girls of the present generation were asked, from what one source they had derived the greatest pleasure and entertainment, the answer would undoubtedly be: "from the St. Nicholas magazine."

To put into the hands of a boy or girl the two handsome bound volumes which contain the numbers for the past year is equal to a gift of half a dozen story books. In fact, some of the most popular books of the year for children have first seen the light in these pages. Here one will find Palmer Cox's irrepressible Brownies, on their tour through the Union; Howard Pyle's brave "Jack Ballister," who got the best of Blackbeard's piratical crew; Albert Stearns's "Chris and the Wonderful Lamp"; Napoleon's dashing page, in Elbridge S. Brooks's "A Boy of the First Empire;" "The Quadrupeds of North America," of all sorts and conditions, described by W. T. Hornaday; and a number of famous horses, historic and legendary, that are very lovingly written about by James Baldwin. There are a series of sketches in a simple and sympathetic vein of "Famous American Authors," by Brander Matthews, and Theodore Roosevelt's inspiring "Hero-Tales from American History." Aside from these serial features the volumes are crowded with stories, sketches, and verses, that will help as well as amuse childish readers. One of the best of Rudyard Kipling's Jungle Stories, which have already been accepted as classics in juvenile literature, is "The King's Ankus."

There are also many articles that are written especially for girls. Even the interests of the very little ones are provided for in the pictures and jingles.

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BOOKS RECEIVED.

AMERICAN STATE REPORTS, Vol. XLV. Bancroft-Whitney Co.

PRINCIPLES OF THE ENGLISH LAW OF CONTRACTS. Eighth Edition. Macmillan & Co.

ELEMENTS OF THE LAW OF AGENCY. By E. W. HUFFCUT. Little, Brown & Co.

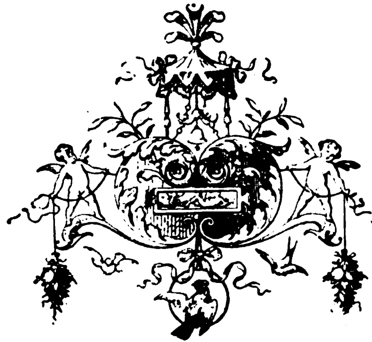
A TREATISE ON LAND TITLES IN THE UNITED STATES. By L. N. DEMBITZ. West Publishing Co. Two vols.

THE ORIGIN AND HISTORY OF CONTRACT IN ROMAN LAW. By W. H. BUCKLER. Macmillan & Co.

INTRODUCTION TO AMERICAN LAW. By TIMOTHY WALKER. Little, Brown & Co.

HAND-BOOK OF THE LAW OF TORTS. By E. A. JAGGARD. West Publishing Co. Two vols.

THE LAW OF COLLATERAL AND DIRECT INHERITANCE, LEGACY AND SUCCESSION TAXES. By BENJ. F. DOS PASSOS. Second Edition. West Publishing Co.



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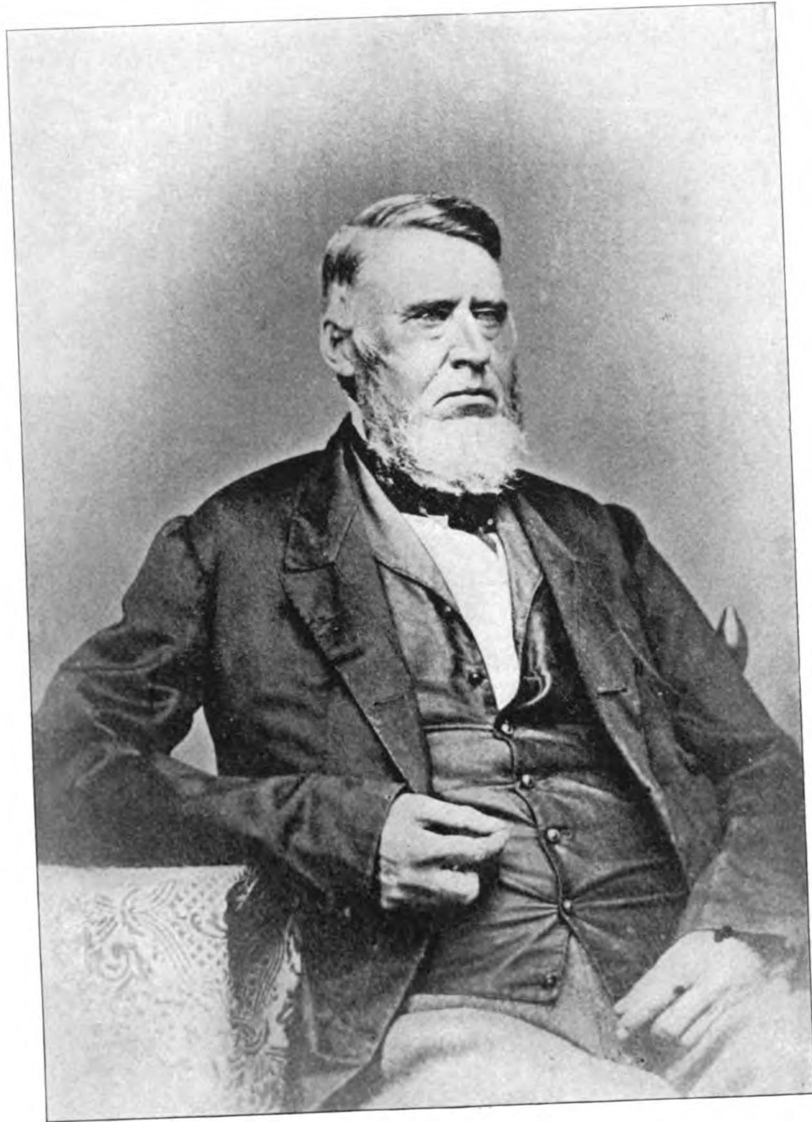

THOMAS BARTLETT.

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The Green Bag.

Vol. VIII. No. 2. BOSTON. February, 1896.

THOMAS BARTLETT.

By Wendell P. Stafford.

THE fame of a unique advocate lingers among the fading traditions of the Vermont Bar. Through all this country-side, where he was known, Thomas Bartlett is still a "name to conjure with."

He was born June 18, 1808, studied law with Isaac Fletcher in Lyndon, Vermont, practiced in this section for forty years or so, was sent to Congress in 1851, and died Sept. 12, 1876. Meagre as this statement is, it will be enough for our purpose. Even these dates will have no interest for most of those who read these pages. If anything about him can hold their attention it will be a delineation of the orator himself. And a remarkable orator he certainly was. Deficient in early education, with many and gross faults of style when judged by the purest standards, there is yet no doubt that, as a jury advocate, he spoke at all times effectively, and often with genuine eloquence and power. He had precisely the make-up of an orator. Large-hearted, generous, sensitive, sympathetic, impulsive, woman-like in tenderness, leonine in anger — laughter and tears alike at his command, and as for language — well, he had kissed the blarney stone. With happier fortune, with severer training, with firmer self-control he might have been, unless all reports about him lie, among the greatest orators that ever spoke. In the first place he had those physical advantages which Wendell Phillips used to say, in speaking of O'Connell, are "half the battle." Of royal height (six feet four, I think), nobly proportioned, with grave and striking features, with a halting step and a palsied arm, infirmities which, as he managed them, really increased the impressiveness of his bearing, — he had only to "address himself to motion like as he would speak" to find his audience half won already in interest and sympathy. And then, when he did speak, a voice of unsurpassed strength, depth and richness did the rest. Fluent to a fault, almost, yet carefully discriminating in the choice of words, he poured before his hearers, often unlettered though they were, his wealth of diction, imagery, allusion, heedless of any fear that it might prove beyond their comprehension. This does not mean that he did not gauge his argument to his hearers. He did. Before a back district jury, in some justice's court, he could be a match in coarseness for Swift or Smollett, or Rabelais himself. Nothing was too malodorous for his use, if it was really of use. But he never forgot that men often admire most what they possess the least of, — that in a speech fine language and lofty sentiment may appeal strikingly to those who have formed but a slender acquaintance with either in every-day life, and he rarely failed to flatter his listeners by a liberal display of both.

How many make the opposite mistake. When a New Hampshire politician rose to address the little town of Carroll in that state, and being the worse for liquor, began, "Fellow citizens, I have *rosen*" — then stopped, dimly conscious that something was wrong, his colleague on the platform whispered impatiently, "D—n it, Jake, go

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on. *Rosen's* good enough for Carroll" ; and he went on. That was not Bartlett's idea. He would rather have endorsed Rufus Choate's reply to the critic who asked him how he could expect a commonplace jury to appreciate his rhetoric. "They appreciate which side it's on," said Choate, "and that's enough." As with Choate, too, the study of language was his delight. He would turn the pages of a dictionary by the hour.

He came to Isaac Fletcher's office at Lyndon Corner one morning to study law, — the greenest, gawkiest lad in all these parts. With a few years of district schooling behind him, and a term or two in the Academy, he was to be henceforth in education a law unto himself. What wonder that he never endured the rigorous discipline which makes a reasoner, never became a thorough lawyer. He had that lazy, moody strength which, after each great effort, lapses into long periods of indolent repose wherein the brooding genius nourishes itself for another flight. On idle summer days he would sit from morning till night before his office door, steeped in the mellow sunshine, oblivious to all that passed around him. And yet he loved his books, — knew his Blackstone well, and could plant his feet, at need, on the solid foundations of the law. It seems to have been a favorite device with him to give an important case interest and dignity by clearly identifying it with some "fundamental principle," which, as he would proclaim in sounding phrase, "underlies the whole fabric of jurisprudence, — the vindication of which has twice deluged England with blood, and more recently our own fair land in fraternal gore." We shall be apt to smile at the Buzfuzzian period. Perhaps his rival smiled, too, but he did so at his peril. It did its work. It impressed the imagination of his jury and tempted them to turn from the confusion of claims and counter claims they hardly understood back to a broad and simple truth where the mind felt that it could rest in safety. His style must often have been pompous, grandiloquent. Yet no one could more deftly prick an overblown bubble for an opponent. I think it was Stoddard B. Colby, an accomplished advocate of that day, who once sat down after an impressive appeal which left the jury on the verge of tears. Bartlett rose and began in funereal tones, with imperturbable gravity: "Dearly beloved brethren, let us continue these solemn services by reading a brief portion of the original writ." The strain was too intense, the spell was snapped and tears gave way to laughter. This faculty of reducing his antagonist's position to absurdity, by saying "such a simple thing in such a solemn way," was characteristic of him and often did him yeoman service. Ossian Ray, then a young lawyer, was summing up a case of assault and battery against Bartlett's client. In an unhappy moment he declared, "We do not demand an exorbitant sum. We do not ask for a million dollars." The defendant sat within the bar, shabbily dressed, unkempt, a picture of poverty. Bartlett rose slowly to reply. "I knew my brother Ray as a boy. He was a generous, noble-spirited lad. He has grown to be a generous, magnanimous man. He says he does not demand a million dollars of my client. I am glad and grateful that he does not. For if he should demand it, and you, gentlemen of the jury, should render a verdict for that amount, and my client should be compelled to pay it, he would be reduced to comparative poverty; it would seriously impair his annual rents and profits." All this spoken with dignified courtesy; no curl of the lip, no twinkle in the eye, not a suggestion in voice or countenance that he was conscious of any incongruity whatever between his ragged client and this stately acknowledgment. The effect may be imagined; it can hardly be described.

If he was not a power in Congress his case was not the first proof that eminence at the

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bar is no guaranty of success in a deliberative body. Perhaps he was not specially fitted to succeed there. But the reason why he failed, to start with, lies in this story. The 4th of July, 1851, was a gala day in St. Johnsbury. There was a big tent, and Bartlett was to be one of the speakers. "Was to be," for nobody was. A crowd of Dartmouth College students came up from Hanover, and, stationed with tin horns at the opposite end of the pavilion, drowned with their noisy rivalry every voice that tried to make itself heard, even the lion roar of Bartlett. The chagrined orator published an angry letter anent the scamps, and the scamps replied in a superior effort, holding up to ridicule the lawyer's well-known weaknesses and pompous mannerisms. When Bartlett took his seat in Congress he found himself already introduced to his fellow members by the irrespressible hoodlums, who had seen to it that a copy of their reply should be lying on every desk. His vulnerable point was exposed, and when, later in the session, he rose to speak, he laid himself open to a sharp thrust from Polk of Tennessee. Warming as he went on, he began to soar, and finally declared in majestic tones, "Sir, were it not for the rules of the house, I would pour upon the opponents of this measure the phials of my wrath." Polk leaped to his feet, and intimating that fun was coming, moved "that the rules be suspended, and the gentleman permitted to to *pour*." To pour under such circumstances was impossible even for Bartlett, and he sat down discomfited.

His chief failing was intemperance; and this reminds me of his best witticism, which had this failing for its subject. Like many other Democrats he became a Republican in the sixties. Being called out at a political meeting to make his first speech from his changed standpoint, he was too tipsy to stand without help, but steadying himself he thus placated his audience: "Fellow citizens, I was born in Democracy, I was nursed in Democracy, reared in Democracy; I have lived in Democracy all my days, and some of its pernicious and damnable practices still cling to me — as you can see." Thereupon he launched into one of his finest efforts.

Nobody could tell a story better. He had a Lincoln-like aptness in illustration. Once he tried a damage case against a circus, which traveled under the name of Sears & Co., for so negligently putting up its seats that the plaintiff fell and was injured. The defendants claimed that the circus belonged to a Mr. Faxon of Liverpool, and that he alone was responsible. "Gentlemen of the jury," said the advocate, "I have a dog, and a mean cur he is, too. He kills your sheep. You call on me for damages. I say, 'Oh, no. The cur wears my name on his collar. He comes when I whistle; he goes when I say 'ste-boy.' But that dog belongs to Mr. Faxon of Liverpool."

No wonder he held the common people in his hand. He was one of them. When the news got out that Uncle Tom was to "plead a case," the court-house was soon filled. He was sometimes accused of turning his back on the jury-box to tickle the outer benches. The criticism was a shallow one. He never forgot the panel. But he knew better than to ignore the larger jury that sat by. He understood how contagious sympathy is, and running his eye along the rows of responsive faces outside the bar, he read the real feelings of the more guarded jurymen before him. There were years when to retain Bartlett in a jury case was considered tantamount to victory— that is, if he should prove to be himself when the day of the trial came, which was not always the case, for reasons before explained. I suspect the court-house is still a more dramatic place in the country than in the city. Every case is more or less of a play anywhere, but here the *dramatis personæ* are better known. It was even more truly so in his day. There

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was many a "celebrated cause." Neighbors gathered to watch its course and nudge each other at every home thrust of witness or counsel. Everybody knew everybody. For a quarter of a century Tom Bartlett was the star actor in these familiar and exciting dramas. In one of them the defendant was a poor widow, and the plaintiff a rich man with a reputation for hard-fistedness. The plaintiff seemed to have the law on his side, but it looked like persecution. Bartlett assisted for the defense. When he reached the climax of his appeal to the jury he turned suddenly upon his colleague. "I am here at the solicitation of my young brother, serving without scrip and without price. I told him I would make no charge. I reconsider. I will charge, and he must now promise to repay. When my shattered form shall be lying in the grave and my wife shall be set upon by legal robbers, and he is standing by with warm heart and large experience, let him come to *her* defense as I have struggled to defend his client here to-day. Dale, will you do it?" "I will," the young man answered, as he grasped the outstretched hand amid the breathless silence of the astonished court-room. It was the finishing touch. The jury melted, and so did the plaintiff's case.

How unlike our own must have been the atmosphere of courts where such a scene was possible. If the advocate should return could he repeat his former triumphs? Hardly. At least not with the same training and equipment. I suppose it is not to be regretted that the day of such successes has gone by, that business now is done like business, that law and fact are coming to weigh more and more, and rhetoric and pathos less and less. And yet it will be long before those who loved to witness such thrilling episodes under the old regime will cease to sigh over the prosy trials of to-day. For still the old men who gather in the court rooms of these counties measure each new advocate against the shadow of this man's passing fame, and when, as still may sometimes happen, a little breeze of eloquence blows through the drowsy precincts of the court, they turn to one another and remark, "That's not so bad, neighbor, after all," and, "No. That sounds a little mite like Thomas Bartlett."

LEGAL REMINISCENCES.

By L. E. Chittenden.

XII.

A PURE judiciary is the mainstay and sheet anchor of the Republic. Intrenched in the Constitution midway between the executive and the legislature, it compels a return to its appointed course when either goes astray. As the central sun of our material universe holds every planet to its appointed orbit, so the judiciary should keep the machinery of government in order and compel its movement as a harmonious whole. Every citizen is interested in the preservation of its purity and its independence.

"To every man upon this earth death cometh soon or late." To every official term of years, or a life-time, there is an end. When the vacancy occurs in the judiciary, is it wiser that it be filled by the appointment of the President or a governor, or by a popular election?

Whether a judicial polity is suited to a community dependsupon the character of its people. In Great Britain, where an incompetent judge is a *rara avis*, and a vacancy is always filled by the best equipped man of the party in power, any abbreviation of the life-tenure would be undesirable. And

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in some of the New England States, where the best judges remain on the bench as long as they are able to perform their duties, by annual or biennial elections, no one calls for a change in the system.

In too many of our large cities, the election system does not work satisfactorily, and the reason is not far to seek. The large salaries paid make a judgeship a capital prize in the political lottery, to be drawn by him who has the strongest "pulls," with very little regard to his qualifications. There are scores — hundreds of men whose qualifications no one would question, whose election would restore to the courts something of their former authority and dignity. But such men will not bow their necks to a political yoke, contribute the first year's salary to the support of a political machine, or permit any "pulls" to be made upon them. Consequently, they never reach the dignity of the bench. Their election would be regarded as a political disaster. The judges wanted are those who will harvest for their party the last possible dollar out of the business before them. Every reference must be sent to one of the party heelers — every advertisement must go to a party newspaper, whether anybody reads it or not. The subject is not pursued, because it is nauseating. It inspires the wish for a return of the old days when our fathers put clauses like this into their constitution: —

"There can be no necessity for, nor use in, establishing offices of profit, the usual effects of which are, dependence and servility unbecoming freemen in the possessors or expectants, faction and disorder, among the people . . . and when an office, through increase of fees or otherwise, becomes so profitable as to occasion many to apply for it, the profits ought to be lessened by the legislature." (Constitution of Vermont, 1777.) An application of such a provision would improve the character of candidates and the dignity of our courts.

There is another error of judgment into which good citizens, fighting for reform, not infrequently fall, which diminishes the dignity of the bench and detracts from its usefulness. One of their associates happens to distinguish himself in some political work, for which he is commended by the press and his party. Forthwith the cry is raised that he must be rewarded. His work may have been full of sound and fury, signifying nothing but his unfitness for the bench. But the spirit of reform is abroad and he is one of its ministers. He is nominated, and if the reform ticket wins, he is elected!

His unfitness is apparent in his first term. He is irritable, passionate and reckless. He disregards the elementary rules of evidence, becomes the advocate of one party or the other, and usurps the functions of the jury. Instead of impartially charging the jury, he harangues them, and finally badgers them until they convict a man of a crime of which he is innocent. Stung by her conscience, the woman upon whose evidence the conviction was, but ought not to have been had, confesses her perjury. A competent judge would have set aside the verdict and discharged the respondent on his own recognizance. This one violently berates him for his general character, gives him no opportunity to reply, and discharges him from the indictment, but *sends him to jail to be held as a witness against the woman!* He is brought before a competent judge, who discharges him because there was no evidence that he had committed any crime, and he could only be lawfully held to appear as a witness upon his own recognizance.

This episode, considered *per se*, might be cited as potent evidence against an elective system. But proof of equal value against appointed judges is found in the same city. Out of more than two hundred applicants, many of them well qualified, the mayor, as he thought, carefully selected and appointed ten justices with criminal jurisdiction. One of these claimed and secured his appoint-

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ment on the ground of superior qualifications, because he had served as an assistant to the District Attorney of the United States in the trial of criminals. Very early in his judicial career a woman of reputable appearance was brought before him by a police officer, who testified that about eight o'clock in the evening he saw her speak successively with two men. Her explanation was that she resided in an adjacent city, from which she had came to visit her aunt. She found that her aunt had left her former residence, and she was making enquiries of these men to ascertain whither her aunt had gone. The justice found her guilty *of the crime of solicitation*, and sentenced her to *five days in the work-house*. On a re-hearing of the case the next day he persisted in his sentence, although the young woman's neighbors testified to her entire respectability. She was brought before a competent judge and discharged on the obvious ground that there was *no evidence whatever* against her. Reporters stated that the justice, on the rehearing of the case, angrily declared that no woman of respectability had any right to be in the street unattended, after nightfall. This the justice denies, and as the case is bad enough on the admitted facts, he should have the benefit of the denial.

It may not be unprofitable to contrast the men whose brief judicial careers furnish such incidents as those above mentioned, with the judges 'whose learning and integrity were conspicuous fifty or sixty years ago. The best of them made mistakes. That was a great truth spoken by a well-known American lawyer to an English audience, that those who never made mistakes seldom made anything. As I recall my experience before the judges of that time, their promptness to profit by their own errors as well as by those of their brethren, seems to have been one of their most delightful characteristics.

Who that appeared before him will ever forget Samuel Nelson? His whole nature was judicial. His mind was clear — his knowledge of law and equity profound, and his judgment thoroughly impartial. No lawyer or layman claimed to have a "pull" on Judge Nelson. He would not have wasted words upon one who attempted to approach him improperly — he would have shriveled him with a look out of his honest eyes. And yet he was one of the most genial of men— a child would not have feared to ask him for a favor.

His influence in the suppression of litigation is shown by an incident related to me by an eminent lawyer who was one of the counsel in the suit in which it occurred. In the early days of the sewing machine there were four parties claiming to own the patents that controlled its manufacture. The litigation between them had been protracted, angry and very expensive. The final arguments were to be made before Judge Nelson at his home in Cooperstown. The preparation had been exhaustive. There were many thick volumes of printed testimony — maps, drawings and models in great number, — and an array of counsel comprising all the leading patent lawyers at the bar. It was expected that the arguments would occupy several days.

At the close of the first day Judge Nelson quietly said to the counsel that "the invention appeared to be one of the most valuable ever made—that each one of the four parties, in good faith, claimed the right to control it. The opening of the argument made it clear that very complicated, grave and close questions were involved, which would probably have to go to the Supreme Court of the United States for final determination." He had, he said, "been asking himself whether the public interests and those of all the parties would not be promoted by an effort in which each party should make some concessions, and so bring about a compromise. To that end he would suggest the postponement of further argument for two or three days."

From an ordinary judge the suggestion

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might have carried no weight. But the parties were men of business, who recognized the fact that, coming from Judge Nelson, it demanded consideration. The result was that within forty-eight hours the parties had compromised the litigation by conceding to each other an equal interest in the invention, and the making of a scale of royalties, which led to an increase in the sale and use of the sewing machine, and earned fortunes for each of the parties within the time that would have otherwise been occupied in a ruinously expensive litigation. Thus the sound sense and wisdom of a great judge brought the sewing machine into general use at least four years before the decision of the questions involved would have permitted the beginning of its general manufacture, and a boon was conferred upon the sempstresses of the country, for which they blessed the name of Samuel Nelson.

Judge Nelson was so thoroughly just, and had so little pride of opinion, that he reversed his own decisions with apparently greater satisfaction than he did those of his associates, when satisfied that his first conclusions were erroneous. Old lawyers love to recall his massive leonine head, his broad shoulders and solid frame — his peculiar gesture, when his right hand and arm described a half circle — his unimpassioned but resistless logic, which swept away his erroneous decision, and built up stone by stone his just and final conclusion in its place! Truly, "there were giants in the earth in those days."

That neither the elective nor the appointing system secures the most competent men for the judicial office in our large cities, must be admitted. Whether either system can be improved, or any better one substituted, is not for me to say. But there is one modern habit into which the old judges never fell. They did not *repeat* their mistakes — they never refused to be guided by established rules of evidence or principles of law. Seventy-five years ago, in one of the New England States, two innocent men were convicted of the crime of murder and sentenced to be hung. Hung, one of them would have been if a venerable old colored minister had not possessed more good sense than the court and jury that found him guilty. He was found guilty because the rule of evidence was disregarded which requires positive evidence of the *corpus delicti;* in other words, direct evidence that a murder has been committed, before there can be a conviction for the crime.

In the same trial another rule of evidence was disregarded. Where the evidence is wholly circumstantial, there should be no conviction unless the evidence is inconsistent with any theory save that of the guilt of the respondent. If there is any hypothesis of innocence upon which all the evidence can be accounted for, he must be acquitted. For example: suppose a person is found dead, from morphine poisoning, and the prisoner is proven to have purchased and handed the poison to him. On this proof there should be no conviction, for the evidence is just as consistent with the theory that the deceased administered it to himself as that the prisoner administered it with criminal intent.

In the celebrated Boorn case both these rules were disregarded, and the prisoners though innocent, were convicted. Not only have these rules been rigidly observed in every trial that has been had in the State where the Boorns were convicted, but their trial is cited upon all proper occasions as a warning against disregarding well settled principles of law.

But there is at least one city in which convictions followed by executions have resulted directly from the violation of these rules. The convictions would have been otherwise impossible. In every such case there must have been a possibility of the respondent's innocence. The heart of judge or juror responsible for such a result must be as unfeeling as the hardest timbered oak,

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or it could never afterwards have the peace of a still and quiet conscience.

Experience has shown the danger of acting on the unconfirmed evidence of the female in a case of an alleged criminal assault. In a late case the judge seems to have usurped the office of the jury and procured a conviction upon such unsupported evidence. The woman then confessed her voluntary consent and offered to plead guilty to a charge of perjury. On this statement the man was discharged. Then the woman retracted her confession, and asserted the truth of her evidence. Every one had had enough of her, and the woman was also discharged. As soon as it appeared that the alleged assault was said to have been made in the room of a single man, early in the morning, before he had dressed, whither the woman had gone to sell him a book; that it was in an apartment house where there were many occupants; that there was no outcry, no confirmatory proof; an old-time judge would have said to her, "Go at once!" and would not have postponed the injunction in the eighth chapter of John's Gospel until she had disgraced herself and made the court an object of ridicule and contempt.

I would not have any Job of the present generation say to these judges of old time, "No doubt ye are *the* people, and wisdom shall die with you." But as Abraham Lincoln, in early life, said of the men of the Revolution, so would one who knew their worth say of them: "They were a fortress of strength, but what the invading foemen could never do, the silent artillery of time has done,—the leveling of its walls. They are gone. They were a forest of giant oaks; but the resistless hurricane has swept over them and left only here and there a lonely trunk, despoiled of its verdure, shorn of its foliage, to murmur in a few more gentle breezes, and then to sink and be no more. . . . But they will not be forgotten. In history they will be read of and their services recounted so long as our Bible shall be read and revered."

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THE GERMAN POLICE.

By Andrew T. Sibbald.

ANY one who has observed the working of the police in Germany must be struck by the wonderfully wide scope of their operations, and the enormous mass of details of every possible kind with which they have to deal; matters, many of them, entirely outside the duties of our police. One would think that for such work men of superior intelligence must necessarily be employed; but this does not appear to be the case. True, there is considerable variety of material. In the large towns, where the police are supplied and maintained by the central government, the "Schultzmann" is a great personage. This is the variety chiefly known to the tourist, and recognizable by his smart long frock-coat, like an officer's undress, his military helmet, and sword. This imposing gentleman is usually a former noncommissioned officer of the army, who, at the end of the regular nine years' service, retired to this appointment. He is nearly always smart, well set up, and dignified; and though he does not appear to parade his beat in the mechanical fashion we know so well, he yet manages to avoid the appearance of idle lounging, sometimes to be observed in this country. These officers are relieved at night by an entirely different set of men, called night watchmen — ordinary citizens, who from dusk till sunrise parade the streets in hideous brass helmets and a kind of fireman's uniform, thus relieving the others of night-patrol duty.

The regular police seem, as a rule, to discharge their manifold duties quietly, and without unnecessary strictness. The superior officials consist, in the large towns, of a police president, or head of the entire police system of the town (of whom more anon), and of a certain number of commissaries (Commissär), each having his own office and staff in a separate district, where he attends to the innumerable matters of greater or less importance that come before him, of which, as we shall see, ordinary street-police work forms really only a small part. These are very grand gentlemen, hardly to be distinguished at a little distance from military officers, and chosen from a somewhat more highly educated class. Besides these, there are various officials connected with the force, and charged with particular duties, such, for instance, as the overseeing of town drainage arrangements. One man devotes his whole energies to seeing that dogs in the streets are properly muzzled; and many an encounter this unenviable official would seem to have with tender-hearted ladies, who cannot bear to inflict those instruments upon their pets, or, the only alternative, to lead them by a chain. Nor are ladies the only offenders, for one gentleman told the writer not long ago, that, in the course of a year, he paid not less than a hundred marks or twenty-five dollars, in fines for this offence, in respect of a favorite collie, which had a knack of escaping from the garden. Here I may mention that, for this and many other offences against public order and convenience—some of which will be mentioned later on—the police have power to inflict summary fines without the formality of a summons before the judge. A policeman calls at your house with a small scrap of paper, called a "strafzettel," on which are set forth the offence and the fine to be levied, with the necessary information, in case you wish to appeal to the court. But if you are a wise man, or unless the whole thing is a mistake, you pay up at once, and get the matter over.

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These regular police officials are paid and entirely controlled by the government; they act independently of the local authorities, and, indeed, often in opposition to them. In the smaller towns and villages of any size, their place is taken by the humbler "Ortsdiener." He, too, is adorned with a sword and a uniform, handsome in itself, if not always in the highest state of preservation; and is often a somewhat elderly, spectacled, and benevolent looking gentleman, whose rule is probably, on the whole, easy-going and paternal, and who is not above smoking the social cigar and indulging in friendly gossip on his rounds.

If we now turn to the duties undertaken by the police, we shall find that their range is as wide as it is various, and includes several matters which, as I have said, hardly come within the cognizance of the American police at all. The head of the police force in a large town is indeed an important officer. He is usually a man of good family, who has served the state in various capacities, and qualified himself after the thorough-going German fashion, by all manner of examinations in law, jurisprudence, and what not, for his present office. He may have served for a time as a judge, as as an official of a provincial government, or in any of the hundred and one branches of state officialism. And it is quite necessary that he should be highly qualified, for much of his work requires tact, experience, and skill of a high order. He has, in fact, to represent the central government in all things. We may take the instance of the expulsion of the Queen of Servia from Germany as a case in point. There the local police president was charged with all the negotiations, and exceedingly well he appears to have carried out what must have been a very delicate and a very disagreeable duty.

The president sometimes comes into collision with the "patres conscripti," who are, perhaps, not more free from human failings than in some other countries that might be named. These differences of opinion arise on very various questions—often in the matter of licenses for houses of public entertainment, where the police have to see that the statutory regulations as to space, etc., are duly insisted on by the local licensing authority, which is sometimes disposed to undue leniency. Or, again, to mention a recent case, the police lay before the town council a recommendation that all owners of houses let in flats should be required to properly light the public staircase during the dark hours. It must be remembered, in this connection, that the "concierge" is unknown in Germany; in most of these houses anyone who goes in or out after dark has to grope his way as best he can. Accidents from this cause are not uncommon. The suggestion would seem obvious and reasonable enough, but the conscript fathers did not see it in that light. Being most of them owners of house property themselves, the appeal to their pockets was too much for their sense of justice. In this particular instance the police have not yet carried their point, but will doubtless do so sooner or later. The same kind of paternal supervision is observed in regard to sanitary matters, such as house-drainage, removal of refuse, and water supply. The police utilize their intimate knowledge of local affairs to interfere at the right moment. They also test at intervals all milk sold in the district, and publish the results in the local papers giving the name of each dealer in full, so that adulteration becomes practically impossible.

To mention all the minor details which this many-sided authority takes in charge would prolong this sketch far beyond its limits; but one or two instances may be given. Take, for example, the registration of all arrivals, departures, and changes of residence in a town or district. Woe betide any proprietor of a hotel or pension who neglects to promptly report the arrival and

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departure of every guest at the office of the "Commissär" of his district; or any householder who does not notify to that individual the name, address, and standing of every member of his household on first arrival in the place, and thereafter of every guest who may pass even one night beneath his roof. Further, he must report whenever he changes his residence within the district, and will be required to state, among other things, what rent he pays for the new abode, if hired, or the price he has given, if purchased. This latter information is utilized for the purposes of the income tax commissioners, of whom the police president is the chief member. Even your new housemaid has to announce herself and produce her papers; and if it should be found that the departing one has omitted to report herself before leaving, she will inevitably be followed to her new place by the dreaded "Strafzettel," for these offences come within the category before mentioned of those for which the police are empowered to impose a fine without going to a magistrate in the first instance, although there is always a right of appeal. Thus you may some morning be presented with one of these unpleasant little documents, and find on inquiry that your servant has been cleaning (that is, banging) the feather-beds out of a window looking on to the street, and that your next-door neighbor, suffering from an inundation of fluff, has called the attention of the "Schultzmann" to the heinous transgression. Contrasting this kind of thing with the grave political and judicial functions discharged by the same authorities, one is inclined to compare the German police to a Nasmyth hammer, which, capable of tremendous power, is yet adaptable to the most delicate work.

With regard to the number of men employed, it would appear to be based on the principle of one man to each thousand of population.

PECULIARITIES OF MANX LAWS.

By George H. Westley.

SOME of the most interesting incidents, in Hall Caine's delightful stories of life in Man, turn upon certain very peculiar laws which exist or once existed in that quaint little island. In the following brief sketch of the Manx statutes, nothing more is attempted than to so interest the student of comparative jurisprudence, that he may be prompted to delve for himself in this mine of instructive and amusing material.

First a word upon the Manx law-makers. The legislature of Man is termed the House of Keys. This institution dates a thousand years back to the time of Orry, a prince of Denmark who invaded the island and became its king about the year 920. The House of Keys was originally a judicial body, its name being derived from its function of unlocking or interpreting the common statutes; but from this it drifted into the making of the laws and is now the legislature. It consists of twenty-four members elected by the people; but no laws enacted by it are valid until read, in the presence of the inhabitants, from Tynwald Hill. This reading takes place July 5th of each year, and while there is less pomp and circumstance connected with the occasion than in former times, there is still enough to make it one of the most peculiar and archaic legal ceremonies in modern Europe.

There are two judges in the island, called

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deemsters. The oath of the deemster is, that he will execute the laws of the island justly and "so indifferently as the backbone doth lie in the midst of the fish," a form said to have been so worded that his daily meal of herring will remind him of the obligation he is under to give impartial judgment.

An appeal from the deemster's decision goes to "the Staff of Government," a court in which the governor of the island is *ex officio* sole judge. The oath of this dignitary is scarcely less quaint than that of the other; it is that he shall "deal as indifferently between party and party as this staff now standeth," referring to an emblem of authority which he holds upright in his hand.

Up to 1417 many of the laws of Man were uncodified. These unwritten statutes were termed Breast Laws. They were imparted unto the deemsters secretly, to be revealed unto the people as might be deemed expedient. In the year mentioned, however, Sir John Stanley, king and lord of Man, embodied these statutes in a written code, to the great satisfaction of the people, who many of them suffered unjustly under the old system.

One of the oddest of the old Manx laws was the following: "If a man steal a horse or an oxe, it is no felony, for the offender cannot hide them, but if he steal a capon or a pigge, he shall be hanged." Another old decree ordains that if a man was proved to have wronged a maid, the deemster was to hand her an axe, a rope, and a ring, that she might deal with the offender in one of three ways, viz., behead him with the axe, hang him with the rope, or marry him with the ring. Tradition has it that the maids were usually lenient.

Slander against any of the chief officers or the House of Keys was punished by a fine of £10 and the loss of both ears. "In case of theft," ran another old law, "if it amount to the value of sixpence halfpenny, shall be felony to death to the offender; and under that value to be whipped, or set upon a wooden horse ordained for such offenders."

Still another of the old statutes read thus: "If any person, having occasion to take the law against another, if that he find him within the Court, he may by law take him by the arm and bring him before the Deemsters, and set his Foot upon him, and take the Law of him, although he never summoned him."

Among the ancient institutions of the island was one known as "setting quests," consisting of four of the lord proprietor's tenants. A setting quest was chosen from every parish in the island, and their duty was to find suitable tenants for any of the lord's lands which might fall vacant. The tenant thus chosen was obliged to take the land, and if he failed to pay the rent, the setting quest was liable, for having chosen an impecunious person.

Servants who should hire with two masters had to serve the first, while the second took his wages, and if the offense was repeated he was to be whipped in the stocks. Another old statute provided that if there was a scarcity of servants to work the lord's lands, the latter, through a "jury of servants," might compel the tenant who paid the smaller rent to work for him who paid the larger.

The deemsters and coroners of the island enjoyed at one time a curious privilege known as "yarding"; that is, compelling the service of persons of either sex at a trifling wage fixed by law. An officer, called a sumner, was sent to lay a straw on the shoulder of the person required, saying, "You are hereby yarded for the service of the lord of Man in the house of his deemster," or coroner, as the case might be. Persons refusing to comply with this summons were committed to prison and kept on small fare until they submitted, when the expense incurred by their refusal was deducted from their wages.

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It is said of the arms of Man (three legs armored and spurred, joined at the thigh, and bent at the knee) that one leg spurns Ireland, another kicks at Scotland, and the third kneels to England. This insular attitude toward their three neighbors would seem to be borne out in the following two old statutes. The first reads "that all Scots avoid the Land with the next vessel that goeth to Scotland, upon paine of forfeiture of their Goodes and their bodys to Prison." The other "that Irish women loytering and not working be commanded forth of the said Isle with as much convenient speed as may be." These statutes have not yet been repealed.

Prisoners were tried by a jury of twelve, the prisoner having the right to select the requisite number from the jurors impanelled. In old-time trials it was the custom of the bishop to sit with the judges, unless the sentence was to be death, when he withdrew from the court. In such a case, the deemsters demanded of the foreman of the jury, in the Manx language, *Vod fir charree soie?* (May the man of the chancel sit?) If the foreman replied that he might not, that was equivalent to a verdict of guilty, and sentence was pronounced as soon as the bishop had retired.

In 1610 certain spiritual laws were made, or rather at that time committed to writing. Most of these related to offenses against morality. Waldron describes one of these laws as follows. "If any person be convicted of uttering a scandalous report and cannot make good the assertion, instead of being fined or imprisoned, they are sentenced to stand in the Market Place on a sort of scaffold erected for that purpose, with their tongue in a noose of leather, which they call the bridle; and having been thus exposed to the view of the people for some time, on taking off this machine they are obliged to exclaim three times, 'Tongue, thou hast lied!'"

Not less interesting than the preceding are some of the old garrison regulations. One of these ran, "Alsoe that noe soldier hould continually a Lemon within a mile of either of said Houses, upon paine of Forfeiting his Fee." This latter is apt to prove rather puzzling at first, but if one can recall Chaucer's couplet,—

> Unto his lemmon, Dallia, he told
> That in his heres all his strengthe lay,

the mystery will be solved.

Among their modern statutes may be mentioned that concerning the recovery of debts, which limits the period to three years. The Sunday closing law is very strict in Man, for if anyone is found in the liquor seller's premises on the Sabbath, he is liable to a fine, even though no intoxicating drink has been called for or consumed.

A law of 1881 gave women the franchise, and they now vote at elections, when possessed of the requisite property qualification, which is the ownership of real estate of £4 per annum ratable value. There is also a tenancy qualification, to which however they were not at that time admitted.

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FREDERICK THE GREAT AND THE LAWYERS.

By O. F. Hershey.

THERE have been many efforts to reform the law, but very few to reform the lawyers, possibly because the connection between the two is often so slight. Frederick II, of Germany, the most heroic figure in history, and, according to Carlyle, the last of the kings, had his own notion of how to reform the law, and began by reforming those who administered it. To your "disgusted layman" nothing should be more entertaining or hopeful than Frederick the Great's disposal of the case of *In re Arnold and Wife, the Millers;* and indeed for the profession itself this *cause célèbre* can point a moral or two; or at the very least it can partially indicate the true spirit in which law-reform should be conceived and executed.

In 1770 Arnold, a young miller, and his frau Rosine were joint tenants of a grist-mill on Crab-run, a little provincial stream near Cüstrin. They held their property subject to a small annual rent due one of the local nobility, and by hard work and true German economy they were barely able to make ends meet. It so happened, however, that one of the land barons up the creek decided to build himself an ornamental fish-pond, and to do so diverted part of the stream; with the result that the Arnold mill ran short of water and the miller was unable to pay his rent. Re-entry proceedings dragged on before the local judge for some years, Frau Arnold contesting every inch so bitterly that she had to be locked up once or twice for contempt of court, until finally she and her husband were ousted and the mill sold.

Frau Rosine had good fighting blood in her, and she at once petitioned *Unser Fritz* to investigate her wrongs. Petition being of no avail, the Arnolds appealed the case to the Neumark Regierung, which confirmed the decision of the lower court in every point. By this time four years had passed, and Rosine again petitioned the King for a military commission. This was referred to the Department of Justice, which investigated and dismissed it. Thereupon she petitioned the Grand-Chancellor, temporarilly sitting in Cüstrin, but he also turned her down. Finally Arnold's brother succeeded in interesting his colonel, Prince Leopold, one of the King's nephews, who eventually enabled the Frau Rosine to get a new petition before the King, who thereupon appointed a Col. Heucking, stationed in Pommerzig, to assist a local commission of judges and lawyers to make report on the facts of the case. The lawyers made one report, the colonel another. Frederick immediately forward the colonel's "*deutliches und ganz umständliches*" report, as he endorsed it, to his Supreme Board of Justice at Berlin, with a cabinet order that justice be done these Arnolds.

A new commission of lawyers straightway sat upon the case. They delayed reporting for some weeks until Frederick, after another petition from the redoubtable Rosine, issued another royal order demanding that the Arnold matter come to an end. Whereupon the learned commission at once handed down its decision: lower court correct on the law, justice clearly done; as to the facts a mistake is discovered, thirty odd dollars still due the Arnolds; otherwise everything all right, Col. Heucking to the contrary notwithstanding.

By this time Frederick's patience was about exhausted, but not quite. He ordered one more appeal — to the highest court in the kingdom this time — and demanded that the chancellor drop all other

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business and pass upon this case immediately. The judges worked on the papers — a small cart-load of them — all night, and the next morning the court handed down its decision, in eight folios, completely affirming that of the other courts. When Frederick heard of this he at once issued a cabinet order for a copy of the judgment and the production of the papers, and although sick in bed, he again went over the case. Next morning there was a royal order summoning the Grand Chancellor and his two associates before their King: and what there took place is, perhaps, as claimed by Carlyle, the most interesting and inspiriting chapter in the whole history of law reform.

The King, who was confined by gout, had his couch placed in the middle of the room, and there, in a shovel hat, red dressing-gown, black velvet breeches, with military boots that came above his knees, he received the Chancellor and his associate judges. No one else was allowed to be present except a stenographer who took a record of every word that was said and afterwards incorporated it all in the King's famous protocol. The judges ranged themselves in front of their royal master, and like school boys up for a whipping waited tremblingly for the fun to begin. Frederick, after a few awkward minutes, finally threw down the copy of the judgment which he had been perusing, and said to Friebel, the most pompous looking of the associate judges: —

"Come here!" whereupon that worthy advanced to within reach of the king's bony forefinger and underwent such an examination into his knowledge of equity and right and "natural fairness," as he never afterward forgot.

"Here is a nobleman," said the King, concluding his examination, "who wishes to have a fish-pond; to get water for it, he taps the stream that runs a poor peasant's mill, so that the miller can do no business except for about four weeks in the year, and of course cannot pay his rent. Now what do the provincial courts do,— they sell the mill so that the nobleman can get his rent. Do you call this justice and fair dealing?"

"No, Sire," answered the portly Friedel.

"And yet," continued Frederick, "the Berlin Tribunal. . . ." Here the Chancellor, piqued at the contemptuous indifference the King has so far shown him, steps forward and meekly corrects: "Not Berlin Tribunal, Your Majesty, but Kammergericht's Tribunal."

"Correct it!" says the King to his stenographer, and then turning to the Grand Chancellor, the highest legal dignitary of the kingdom, he says:—

"And you,— go you, sir, about your business, *instanter*. Your successor is appointed; I am done with you. *Fort*."

Which order the Chancellor obeyed with the utmost speed. The other judges were not so fortunate. He read them a mighty lecture on law and equity, all set forth in the Royal Protocol of December 11, 1779, and then clapped them in jail. Sentence was, dismissal from office, one year's confinement, and payment of compensation to the Arnolds for all losses and costs. The judges of the lower courts were then sent for, and likewise punished,— all except Cüstrin Regierungsrath Scheibler, who had dissented from the decision of his colleagues; he went free; was, in fact, promoted.

This attempt to reform law by example set all Europe talking. The Berliners took the side of the judges, thought Frederick had been too severe, and immediately upon his death the disgraced dignitaries were reinstated. But the King's protocol did its work. Catherine of Russia promulgated it as a noteworthy example of royal supreme judicature; the French people went wild over it; both kings and peasants found hope in it. And a noteworthy document it is; well calculated to arouse Carlyle's en-

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thusiasm for the strong and heroic; and well deserving the special enthusiasm of all who have to do with law and lawyers. Surely these extracts from the famous document are not grown entirely archaic in these days of equal rights for none and special privileges for all. Heroic judges might commend these words to some of their suitors: —

" . . . The King's desire always is and was, that everybody, be they high or low, rich or poor, get prompt justice; and that, without regard of person or rank, no subject of his fail at any time of equal right and protection from his courts of law. . .

"Wherefore with respect to this most unjust sentence against the miller Arnold of the Pommerzig Crabmill, pronounced in the Neumark and confirmed here in Berlin, the King will establish a never-to-be-forgotten example; to the end that all courts of justice in all the King's provinces may take warning thereby, and not commit the like glaring unjust acts. For let them bear in mind that even a beggar is no less than His Majesty a human being, and one to whom due justice must be meted out. . . . And whenever the law courts do not carry out justice in a straightforward manner, without fear or favor, but put aside natural fairness, then let them look out for *Seiner Königlichen Majestät*. For a court of law doing injustice is more dangerous and pernicious than a band of thieves; against these one can protect oneself; but against rogues who make use of the cloak of justice to accomplish their evil passions, against such, no man can guard himself. These are worse than the greatest knaves the world contains, and deserve double punishment. . . Courts which fail to deal in equity and justice and natural fairness henceforth can see from the example I have made in this case, that they will be visited with swift and rigorous punishment.

" . . . Of which all Colleges of Justice in all His Majesty's provinces are particularly to take notice."

And they did take notice — and do to this day.

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THE SUPREME COURT OF MAINE.

V.

By Charles Hamlin.

THE original design of these articles has now been accomplished. It consisted in a sketch of the early courts of Maine, extending down to the present system, with brief memoirs of the Chief Justices who have presided in the Supreme Judicial Court, and its associate justices who now occupy that bench. As references have been made to other associate justices who, during the past forty years, were on the same bench, and by their exalted character and abilities have helped to make a large part of the judicial history of the State, their reputation and influence extending beyond its limits, I am impressed with the belief that their memoirs will prove interesting and agreeable reading. For this purpose I have selected five judges before whom I have practiced, and with a part of whom I was associated as Reporter of Decisions. They are Jonas Cutting, Edward Kent, William Wirt Virgin, Charles Danforth and Artemas Libbey.

Jonas Cutting, son of Jonas and Betsey (Eames) Cutting, was born in Croydon, N. H., November 3, 1800, and died in Bangor, Maine, August 19, 1876, being nearly seventy-six years old. His father, son of Francis Cutting, came from Worcester, Mass., and settled early in Croydon, on the banks of Sugar River, near the Newport line. Two brothers, Benjamin and Jonathan, came to Croydon at the same time. The descendants of the three brothers are still residents of Sullivan County. Some of them retain the family trait of wit and humor. One of them, Jonathan, son of Jonathan, an active and worthy deacon in the Baptist church, in the adjoining town of Newport, labored for a man whose love of gain required his hands to be up, eat breakfast, and be miles away to the woods with an ox-team before light. Wishing to give his employer a gentle hint that he was asking too much of his workman, he did so, when asked to pray one morning, in this wise: "We thank thee, O Lord, that thou hast brought us in safety *thus far* through the night; and if in thy providence we are permitted to see the light of another day, may we go forth to its duties with a cheerful heart and in thy fear," etc. The next morning he was permitted to eat his breakfast by daylight.

Jonas Cutting was prepared for college mostly under the tuition of Otis Hutchins, principal of Kimball Union Academy in Plainfield, and entered Dartmouth College in 1819. When he left home to enter college his father was unable to spare his horse from work longer than would take him half the way, and the latter portion of the distance between his home and Hanover he traveled on foot, with his feather-bed and other outfittings in a pack upon his back. In this act of self-reliance and determination may be seen upon what foundation rested his success both in college and in after-life. He was graduated with first honors, and excelled his class-mates in Greek. His college-life and experiences were often a theme of pleasant recollections and talk; and he used to recur to them in the presence of those with whom he was familiar. As he recalled those times, I think his most precious reminiscence was that Rufus Choate was his tutor, and that he gained his respect and esteem, which lasted as long as that world-renowned advocate lived. He delighted too in praising his tutor's wonderful scholarship and the ease with which he imparted to all the class an ambition to become fine scholars. That his sway and

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influence in these respects were potent, no one doubts; but besides, he was gentle as a woman in his manners, — a mild admonition, if needed, taking the place of rebuke. One of the duties of tutor Choate was that of church monitor. One Monday morning all the absentees from church gave the equivocal excuse of "indisposed," adopting the word used by the first student called up and required to explain the cause of his non-attendance at church. At the end of the roll-call there was a profound silence; but after some pause the tutor said: "Young men, I never knew of so great an epidemic as this accompanied with so little mortality! Do not let it occur again!" As the class had just before this made their tutor the present of a beautiful rocking-chair, I doubt whether Longfellow or Carroll Everett could have turned the situation more neatly.

In due time he was graduated with the class of 1823, and Dartmouth, chary of her honors, gave him in 1858 the honorary degree of Doctor of Laws. His high standing and scholarship at his graduation so greatly impressed a leading member of the New York Bar, Mr. Daniel Lord, that he invited him to enter his office as a student, offering to lend him at the same time all the money needed to discharge the debts incurred in obtaining his college education; but the independent spirit of the young man compelled him to decline this generous offer; and he began teaching school, and later spent a year at Portsmouth as a journalist with Judge Levi Woodbury, who became much attached to him, and would have gladly retained him as his partner. His strong desire to enter upon the profession of law outweighed all other inducements held out to him, and he began its study first with Henry Hubbard, of Charlestown, N. H., and afterwards with Reuel Williams, of Augusta, Maine, where he was admitted to the Bar in 1826. Mr. Williams was one of the ablest real estate lawyers in his day and noted for his sound judgment. This is the advice he gave the young lawyer, who had become a favorite by his close attention to study: —

"Stick closely to your office, so that clients may always find you in, and make them pay even if obliged at times to sue for it; they may get mad, but will come back to you again; whereas, otherwise, they will not return, but employ another. When acting as referee, make up your award, and after notifying the party entitled to it, never deliver it, however wealthy he may be, until your fees as referee are paid."

He began the practice, in 1826, at Orono, Penobscot County, then the center of extensive lumber-manufacturing, and remained there until 1831, when he removed to Bangor, where he ever after resided until he died. He at once formed a law partnership with the late Governor and Judge Kent, which, under the style of Kent and Cutting, continued seventeen years, and maintained a standing at the very head of the profession in Maine. Of this firm Chief-Justice Peters has recently said: "A very strong and enduring mutual attachment existed between these two eminent and estimable men. They were very able lawyers, in somewhat different ways. As a firm, the combination of character and ability was complete. They were afterwards, for fourteen years, associated together upon the bench of the Supreme Judicial Court of Maine. Their judicial terms expired at nearly the same time; they were of about the same age, and died within a few months of each other. Both grew old gracefully, with but few wrinkles upon the face, and none upon the mind, consoled by those enjoyments that should accompany old age, 'as honor, love, obedience, troops of friends.'"

He was in active practice at the bar nearly thirty years, and soon came to the front rank among the very able lawyers in eastern Maine. Among his contemporaries then in full practice were, William Pitt Fessenden, who resided in Bangor a while; ex-

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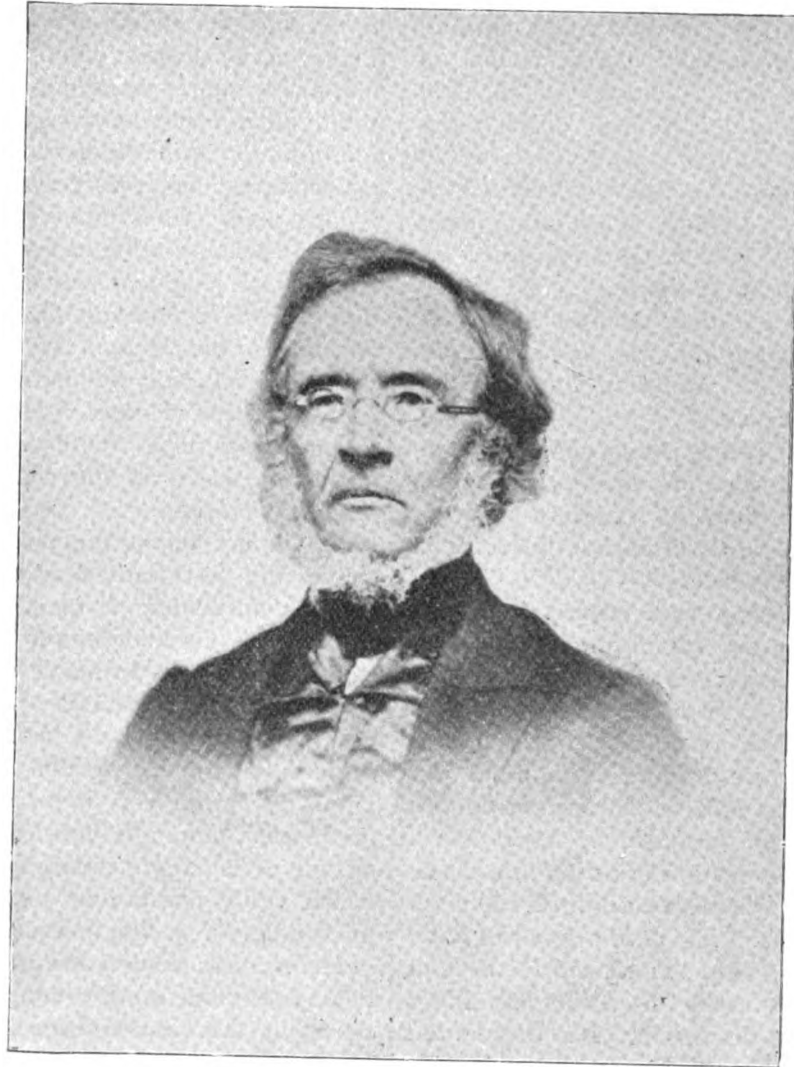

JONAS CUTTING.

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Chief Justice Appleton; Judge Hathaway, who became Judge Cutting's associate on the bench; Elisha H. Allen, afterwards minister plenipotentiary of the Hawaiian Islands at Washington; Judge Frederick H. Allen, and Jonathan P. Rogers, Attorney-General, a man of remarkable abilities, and a "bright, particular star in the legal firmament of Maine," who died at Boston in 1846, at the comparatively early age of forty-five years. Of the still younger generation that were his associates at the bar were, Chief-Justice Peters, ex-Gov. Washburn, James S. Rowe, Judge John E. Godfrey, Albert W. Paine, Daniel T. Jewett, ex-United States Senator, still a leading member of the St. Louis Bar, George P. Sewall, and others distinguished in the profession, who were his intimate associates.

The distinguishing traits and characteristics which made him thus prominent at the bar, and many of which reappear in him as a judge, are thus felicitously described by Chief-Justice Peters: —

"Judge Cutting, as a lawyer, had great skill in analyzing complicated facts. He had an aptness for organizing the materials of a law-suit, and would marshal them into an array with the care and precision of a veteran handling troops. His mind was methodical and orderly, and his perceptions clear, quick, and very acute. There was a definiteness of thought or action in what he said or did. His mind easily held the track it started upon. The needle-gun had not a more unerring aim. It pierced to the root of the matter, easily discarding all things collateral to a discussion. Not that he did not see all the points involved in an investigation, for he had a rare ingenuity for nice and refined reasoning in technical cases, when the occasion called for it. He had a good deal of practice at the bar in tax-title cases, where the law is strictly construed to save forfeitures, cases that grew up after the business break-downs from 1836 to 1838, and he exercised the skill and had the success of a veritable sapper and miner in destroying the foundations of tax-titles which came in his way. Saladin's sword was not sharper than his intellect, in dissipating to pieces the false structure of an adverse legal argument. He was prompt in seizing upon all advantages afforded by the neglect or mistake of opposing counsel, and, like a sailing-vessel hugging the wind, would often make headway by an adroit appropriation of the forces that were pressed against him. Not that he was not a wide-minded man. He showed at the bar and upon the bench that he had abundant stores of practical judgment and common sense. He possessed a thorough knowledge of the principles of the common law, and displayed great acuteness and wonderful readiness in applying them to cases. He was an uncommonly safe legal adviser. . . Many of the remarkable cases in the courts of Maine were his victories."

He was not among the most learned, but among the best learned of his profession. He was adequately learned, confining his explorations for knowlege to a few well-selected, rather than to many books, both in law and general literature. He possessed a very clear and accurate knowledge of the subjects investigated by him. He had early imbibed from the very well-springs of jurisprudence, a thorough knowledge and appreciation of legal principles, the mastery of which easily constituted him the accomplished lawyer, judge, and jurist.

His name as counsel and attorney first appears in the fourteenth volume of Maine Reports, in the case of Russell *v.* Babcock, p. 139, a question upon the statute of frauds, decided adversely to his view of the law; but he had the satisfaction of seeing his opinion on the same question sustained by later decisions. His success in the next case was more immediate and satisfactory, State *v.* Bishop, 15 Maine, 122. The defendant was indicted for selling lottery-tickets, and the indictment gave the defendant the addition of

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"lottery vender." He filed a plea in abatement and argued that this addition was an epithet calculated to prejudice the jury, and assumed as proved the very issue to be tried on the plea of not guilty. The court sustained the plea and discharged the defendant. In all of the succeeding volumes, including the thirty-eighth, until he went upon the bench, will be found his cases, increasing in number until they reach more than twelve per volume. As the reported law cases in those days rarely ever reached one hundred to the volume,—often much less,—his standing and ability, as described by Chief-Justice Peters, is thus fully corroborated. The prevalent custom, too, of reporting arguments of counsel more fully than at the present day, affords a field from which to draw instances in which some of those rapier thrusts of "Saladin's sword" were employed to the discomfiture of his opponents. In Rowe *v.* Godfrey, 16 Maine, 128, he argued against the admission of depositions containing leading questions to the witness, where opposing counsel was not present, and urged the court to discountenance the practice in these words: "The practice is to be arrested, or a witness is to be reduced to the position of an automaton, governed and controlled solely by the pulleys and wires attached to him and the counsel." In Billington *v.* Sprague, 22 Maine, 34, only two of the three referees named in a rule of court had joined in making an award; and counsel, opposed to the acceptance of this report of a majority, claimed that there was no authority to issue a rule authorizing a major part of the referees to report, although it appeared that such was the usual form and that there had been a full meeting of the board attended by both parties. Alluding to the consequences that must follow if this technical objection prevailed, he thus concludes: "Most assuredly writs of error and a reversal of judgments in all such cases. And the defendant's counsel at this late day shall have all the credit of having made the discovery, and of springing a trap upon the community and catching his own client." In connection with the authorities cited by the other side in this case he says: "Perhaps I ought to except the case of Tetter *v.* Rapesnyder, 1 Dall. 293. This case I consider no authority; it was only the decision of an inferior court, and whether an inferior judge or not, we have no means of determining, excepting from the absurdity of the decision." The reader does not need to be assured that the opinion of the court, drawn by Chief-Justice Whitman, overruled the technical objection. In Argyle *v.* Dwinel, 29 Maine, 29, which was a writ of entry to recover a lot of land located for public uses, he argued for the plaintiffs, and claimed that the trustees were not legally trustees, and that their acts were void. On this point he said: "And this leads me to the fourth point, or Satan on the mountain, for this board of trustees undertake to give away what they do not possess."

Hodgdon *v.* Chase, 32 Maine, 169, is a *cause célèbre*. His argument, reported in full, showed such terse logic and reasoning that the court, although feeling compelled to decide against him, did not undertake to answer it; saying, orally: "It has been argued by the plaintiff's counsel with much ingenuity and force, but we think the reasoning cannot prevail. To maintain such an action would render the statute inoperative, except to change the form of actions from assumpsit to case or tort." In commending the argument, Chief-Justice Shepley pointedly called the attention of the Bar to it, and advised them all to read it. In the leading and oft-cited case, Reed *v.* Pierce, 36 Maine, 456, he had better success with the court, where his argument was sustained, it being there decided that a discharge in bankruptcy is not a bar to action of covenant broken when the action did not take place until after the filing of the petition in bankruptcy,

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and the covenant relied on in the action was the one of general warranty.

As an illustration of his being a sound legal adviser, I recall the fact, as he told me, that he discountenanced bringing actions for slander and libel. He would not bring such a suit for a merchant unless he could prove special damages or injury, such as those which affected his financial credit.

He came to the bench of the Supreme Judicial Court, April 20, 1854, by appointment of Governor Crosby, who recognized his eminent fitness for the position without the aid of petitions or other written recommendations, and he served for the term of twenty-one years, consisting of three several appointments of seven years each. He remained in active performance of his judicial duties until the close, and as long as his bodily strength permitted him to enjoy its services.

It is easy to see that he brought with him to the bench the training and mental endowments that afterwards became conspicuous in him as a judge. He was a model judge, in the ease and simplicity with which he presided on the bench. There was not in him the slightest affectation or pretension, or undue official pride. He had the patience and gravity of bearing prescribed by Bacon in his essay on judicature, with "the happy medium of promptness and deliberation." Says an eminent judge, "He seemed able to shut himself up within the walls of a cause on trial, knowing and caring for nothing outside of it." This same thought was also expressed in these words by his college tutor after he became the great advocate, and spoke them in the Massachusetts Constitutional Convention of 1853: "He shall know nothing about the parties; everything about the case. He shall do everything for justice; nothing for himself; nothing for his patron; nothing for his sovereign. . . . If Athens comes there to demand that the cup of hemlock be put to the lips of the wisest of men; and he believes that he has not corrupted the youth, nor omitted to worship the gods of the city, nor introduced new divinities of his own, he must deliver him, although the thunder light on his unterrified brow." He was so careful and painstaking in his understanding the law and facts of a case, that his rulings were seldom wrong, and he was rarely overruled. While his bearing in a trial was that commended by Bacon, I do not think the Bar ever thought his dignity approached sternness, for he did not always suppress his wit and humor. At the close of a tedious pauper case that had lasted several days, turning on the precise day of the birth of the pauper, and on which question a large number of witnesses had been examined, a fresh witness was called just as the hour of adjournment for the day arrived. Counsel began the examination with several long preliminary questions, and as the Judge did not desire a night session, he stopped the proceeding with the remark: "I guess we won't have this baby born until the morning," and thereupon adjourned his court. On another similar occasion counsel recalled a witness, in rebuttal as he said, and began going over the facts again, already testified to on the chief examination. The witness was slow, the supper hour was passed, and counsel urged his witness along with the remark, "Go on, sir; go on," when the Judge turning to the witness said: "Yes, sir; go on and *go off!*" In Bryant *v.* Glidden, a famous suit in Lincoln County, which was a flowage case under the "Mill Act," he sat in the last trial. More than one hundred witnesses were called on each side. This was in 1854, according to the report of the case in 39 Maine, page 458, before the days of the stenographer. I have seen his report of the evidence written out in full, covering over three hundred pages. It is a marvel of beauty for its legibility and neatness. Days were consumed on the question of damages to the grass and the consequent deleterious effect upon the milk and butter-

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making qualities of the cows that fed on the banks of the stream above the dam. There seemed to be after a while an end to the questions about the cows; and at the dinner-table the Judge called the counsel to him and inquired of them if the subject had been exhausted. They replied that it was. Then said the Judge: "I guess you have overlooked another important branch of inquiry — the effect of this grass upon bulls."

As would be expected of a judge of his ability and individuality, his legal style and character are impressed with unmistakable distinctness upon his written opinions. Some of them are admirable specimens of that close and technical reasoning for which he had an uncommon aptitude, and which he knew so well how to use when occasion required. If at times he seemed to be a critic, it was because he was a critic for conscience' sake. He was a razor, as has been said of another, to keep us clean, — not a lancet to bleed us.

Those who were in full practice before him will hardly be prepared, however, to believe that he dissented very rarely; much less often, by far, than his genial and amiable associate, Judge Kent. An examination of his opinions and the reported cases discloses such to be the fact, beginning with his first opinion, Gilbert *v.* Curtis, 37 Maine, 48, and ending with his last, Crocker *v.* Pierce, 61 Maine, 58. His opinions average about twelve per annum. A reference to some of them may interest the reader. He thus begins in State *v.* Lull, 37 Maine, page 248: "It is contended that the witness, the owner of the goods alleged to have been stolen, should first have stated what kind of goods were taken, or given some description tending to identify the same, before the goods were exhibited to him. This proposition assumes that every merchant or trader must necessarily know, and be able to state from *memory*, the amount and description of every article kept in his store, and default thereof, to be the proper victim of plunder and robbery. We think that few merchants would subscribe to such a doctrine, or if they did so, that the principal item in their balance-sheets might be that of profit and loss; whereas we can readily perceive, and daily experience proves, that a person may identify property as belonging to himself from *inspection*, which otherwise might have escaped his recollection." In Kendrick *v.* Crowell, 38 Maine, 42, the defendants were sued on a note given to a town treasurer in the settlement of a liquor fine. The defendants claimed that the note was void as being without a legal consideration, and the jury were so instructed and so gave their verdict. The plaintiff excepted. In his opinion sustaining the verdict, the Judge pointedly says: "The object of the law is to punish its violation; and the mode specially provided is by the actual payment of the fine, to be enforced by immediate imprisonment until its payment, etc. The object of our statute was not to raise a public revenue, or to put money into the pockets of private individuals; but was what its title imports, 'An Act to restrict the sale of intoxicating drinks.' And how to restrict? Certainly not by permitting persons to violate the law on credit, or to transact such business on borrowed capital. Such would be the result, if the note in suit were held to be valid. If a party interested have the right to take a note with surety, he has also an equal right to receive it without security; and let it once be understood that such judgments or claims can be so easily and readily satisfied, and the law to a large class of traffickers in intoxicating drinks would be shorn of half its terrors. In this case, as between the parties, '*potior est conditio defendentis.*'" Upon a question of pleading he says, in Penley *v.* Whitney, 48 Maine, 352, "And we are not disposed, at this late day, without the aid of legislation, to obliterate so many legal monuments of the law, to avoid defects in the declaration

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now before us." . . . He thus comments in Jay *v.* Carthage, 48 Maine, 358, on the unwise manner of disposing of a case that had been opened to the jury: "And, if the point raised be successful, it will only disclose another instance of the folly of too readily withdrawing a good cause from the jury, and the rulings of the judge at nisi prius, and referring the same for a final decision to the law court, on a report full of latent, technical objections."

What constitutes a valid seal has been a frequent question before the courts. He did not allow the defendants in Woodman *v.* York and Cumberland R. R. Co., 50 Maine, 550, to escape the obligations of their bonds which bore only a printed impression of a seal, etc.; for he found its use authorized by statute, and adds: "Here, then, is a substance affixed to the instruments more tenacious than wax or wafer, adopted and declared by the company to be their seal; and we know of no decision in this enlightened age which declares it to be otherwise." Reference has already been made to his power of sarcasm in the preceding volume at page 554, in the case of Simmons *v.* Jacobs. There was an attempt made in that case to prove that the appearance of parties by their attorney had been unauthorized, and thereby avoid final judgment in a long-contested equity case. He thus speaks of the legislation at that time regulating the admission of attorneys to the Bar in Maine: "Dishonesty can hardly be imputed to attorneys, who for years heretofore have been admitted, under modern legislation, to practice in all our courts, upon the presentation of a certificate from the selectmen of *good moral character*, and proof of the payment of twenty dollars each to the county treasurer. Under such legislation, *ignorance* has been no bar to admission, but *dishonesty* always has. . . . We do not impeach the omnipotence of the Legislature for creating attorneys, as the world was created, out of nothing; or the power to control such eccentric orbs within their appropriate spheres. Our province is rather to ascertain their orbits and to harmonize their motions, if possible, with the movements of other bodies." Of the employment of a lobby before the legislature in the case of a division of a town, Frankfort *v.* Winterport, 54 Maine, 250, he says: "We frequently hear of such persons in attendance, but had always supposed it was either at their own expense or that of their friends, and are still of that opinion. Undoubtedly all corporations, and towns as quasi corporations, may use all lawful means to advance or protect their rights before any legally constituted tribunal; and for that purpose may employ agents or attorneys, but are restricted to a reasonable number. An assault by storm can be justifiable only in case of war; a *casus belli* before war is proclaimed will not permit it."

I think his raciness of style has never been equaled by any other judge of this court. Nicholas Emery, his predecessor, had something approaching it at times, with a gentleness of mild humor. Judge Emery will long be remembered for the following comment on women's rights in his opinion in State *v.* Burlingham, 15 Maine, 104: "The whole theory is a slavish one compared even with the civil law. The torch of Hymen serves but to light the pile on which those rights are offered up. The merging of her name in that of her husband is emblematic of the fate of all her legal rights." It was he who, speaking in Woodward *v.* Shaw, 18 Maine, 304, of a statute making an illegitimate child an heir of its father, said: "Whether it be really calculated to produce a deeper respect for the marriage relation, time can alone determine. It is at least an experiment to do some justice to an unoffending being brought into the world by the ardent original efficiency of man, not under the sanction of the marriage covenant."

The fearlessness and independence that he manifested on the bench were never shown better than in the following instance.

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Howard A. Cleveland was indicted and tried for the murder of Warren George, at the February term, 1869, of the Supreme Judicial Court, at Bangor. The jury returned a verdict of "guilty of the murder whereof he stands indicted." At a subsequent term of the court, Cutting, J., presiding, he sentenced Cleveland to be hanged for murder in the first degree. The statute then provided that such a sentence should not be executed until the expiration of a year from the time it was passed. Before the expiration of the year it was ordered by the executive council that the justices be required to give their opinion upon the question whether the jury by their verdict had found Cleveland guilty of murder in the first degree. In answer to this request he submitted the following reply: —

"At the trial I did not preside, but at a subsequent term, after all objections as to the prior rulings and findings had been waived, on motion of the attorney-general, as the judge presiding, I was required to pronounce the sentence of the law. Thereupon I examined the record of the former conviction, on the exhibition of which I found that the prisoner had been indicted for murder in the first degree, and that the verdict of the jury was that he was 'guilty of the murder whereof he stands charged.'

"I was aware of the statute which requires 'the jury, finding a person guilty of murder, to find whether he is guilty of murder in the first or second degree.' I then and still entertain the opinion that the finding of the jury was a strict compliance of the statute, that it was a finding of murder in the first degree, of which the prisoner stood charged. A further finding would have been superfluous. To the judicial mind all arguments to the contrary must be considered as poor logic, and adverse to adjudications in the highest courts in this country. If there be any decisions to the contrary, the finding, 'as stands charged' was no part of the record. But whether my conclusion was right or wrong, I pronounced the sentence, and the judgment and record of the court was made accordingly, and that judgment must stand as the guidance of the executive until removed on a writ of error, as prescribed by statute.

"Neither the prisoner nor his counsel has seen fit to claim such a process, upon which alone, if error was committed, could redress be had after a hearing of both parties.

"Now I would respectfully suggest to the council asking my opinion, whether there is any statute or law constituting them a court for the hearing of errors in criminal matters. If they answer in the affirmative, then they assume judicial powers and usurp jurisdiction in the last resort, in all cases of misdemeanors and felonies, whenever there shall be a petition presented for a pardon.

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During the last seven years of his life I was his daily companion, and became impressed with his simplicity of character,— using the word in its highest and best sense. A neighbor and intimate friend said of him in this respect that this predominating faculty was conspicuous in all his public and private life. It affects him through and through. It would naturally follow that he was an honest man. His integrity was free from all spot or taint. He was an honest man in the liberal sense of the term; that is, he was an unselfish man, and coveted nothing not his own. He was satisfied with what he had and what he was. He was a sincere man: there were no false sides, equivocations, duplicities, or shams about him. He had no great patience with falsehood in any of its forms, anywhere; and upon tempting occasions, where any wrong was to be rebuked, could be plain-spoken and severe. I am glad of the opportunity to reproduce what his life-long friend, Judge Kent, said of him in this respect when he came to place the last solemn tribute to his memory upon the bier of the dead judge. He said: —

"This genuine and unadulterated integ-

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rity was exhibited without ostentation or pretense in his whole life. Everywhere and at all times he was simple, single and sincere. He said what he meant, and he meant what he said. His 'yea was yea,' and his nay most emphatically nay. His daily walk was in a straight path, and he knew not how to seek and find the by-paths of indirection or mystification. Neither flattery nor seductive promises could allure him aside or tempt him to walk in devious ways.

"With all his great keenness and accuracy as a lawyer, and his quick perception and appreciation of the mistakes of an opponent, and of the opportunities for success thus opened, I speak from knowledge when I say that not all the wealth or honors of the world could have tempted him to intentionally and consciously aid in the success or consummation of fraud."

Near the close of his last term, in 1874, he presided at the trial of Amos C. Benner, in Washington County, charged with setting fire and burning in the night-time the dwelling-house occupied by Charles P. Holland, in Pembroke. At the close of the long trial, which excited great interest throughout the State for the gravity of the offense, and of which the jury found the defendant guilty, he doubtless felt the sentiments in his mind which have already been portrayed above. He closed his charge in the following words: "Now, gentlemen, I have discharged my duties to you, and in conclusion I can only say that my judicial tenure has nearly expired. This is probably the last time I shall hold a term of court in this county, for my judicial term has nearly terminated, as well as, perhaps, the term of my own life; and all I can leave the State, the glorious State of Maine, which I love, as a legacy, is the prayer that she may always live under good and wholesome laws, and that those laws may be faithfully executed by the tribunals of justice. Gentlemen, take this case and deal with it according to the evidence."

He had a beautiful and simple religious nature; not allowing himself to be troubled with the fine distinctions between different theological creeds and dogmas, his religious faith was as steadfast as an anchor.

When he quit the bench the Bar expressed its affection and respect for him by a public meeting and eulogistic resolutions, supplemented by the present of a richly engraved gold-headed cane and a silver service.

In person, he was tall, but light for one of his frame. His constitution was healthy and capable of great physical endurance. His countenance, surmounted by gold-bowed glasses, was dignified, beaming, and expressive of the lawyer and judge. In gathering these scattered memorials of a life that successfully fulfilled the mission accorded to him, I recall with pleasure the many happy hours spent with him in conversation, enjoying the social pipe and looking out upon the flowing Penobscot, upon whose banks he reposes after a life that is a benefaction to all who come after him.

EDWARD KENT, of Bangor, justice of the Supreme Judicial Court of Maine, was born at Concord, New Hampshire, January 8, 1802. He was the sixth child and youngest son of William Austin Kent, a native of Charlestown, Massachusetts, who had settled in Concord. His mother was a native of Sterling, Massachusetts, and sister of Prentiss Mellen, the first Chief-Justice of the State of Maine. A sketch of his life is given in Vol. VII of the GREEN BAG, page 464. The entire family of Mr. Kent consisted of four sons and four daughters, of whom the majority attained social position and distinction.

Edward Kent, after the usual elementary and academic education, matriculated at Harvard College, and was graduated from that institution in 1821, at the age of nineteen. Among his classmates were Ralph Waldo Emerson, the philosopher, Josiah Quincy, afterwards mayor of Boston, Robert Barnwell, president of South Carolina Col-

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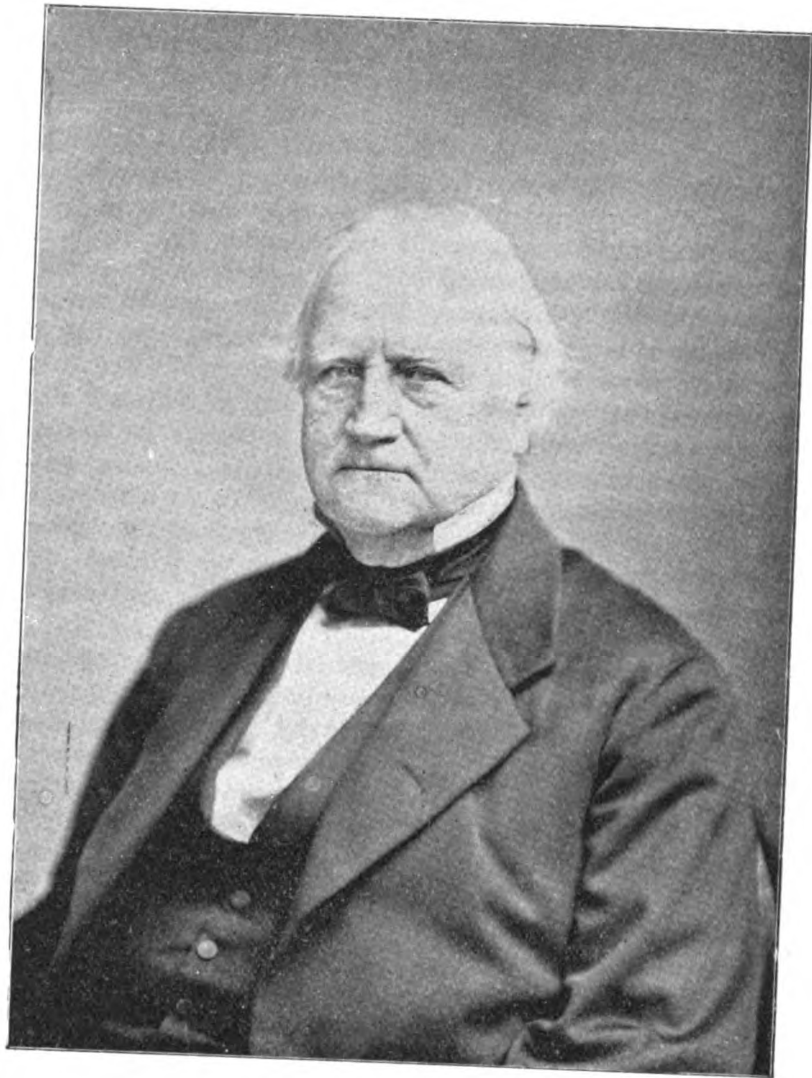

EDWARD KENT.

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lege, Charles D. Upham, member of Congress, and Judge Edward Loring.

Mr. Kent was at that time, as in after-life, a man of massive frame, and the ease-loving, somewhat indolent habit which is often the accompaniment of the largely built man. While at College, he was president of the "Lazy Man's Club," a famous institution at Harvard at that time, one of the rules of which was, that no member should ever be in a hurry. One day Kent was seen trotting across the College yard. As he was the most distinguished member of the club, his colleagues, who detected him in this apparent breach of rules, haled him before the club, and with great glee proceeded to put the alleged delinquent on trial.

Kent listened, with a calm and complacent smile, to the evidence, which seemed conclusive and damaging to his reputation and high office; but, when his turn came, he utterly routed his accusers, and set the university in a roar by gravely presenting this remarkable and exceedingly ingenious defense:—

"I do not deny," said he, with a chuckle, "that I ran; but the fact is, when I was coming down stairs, somebody pushed me, and, to save myself from falling, I had to break into a run; as I was too lazy to stop running, I kept on until you gentlemen stopped me."

Tradition does not say whether the judge was re-elected president of the club, but his complete vindication would seem to indicate that he stood higher than ever in its favor thereafter.

In the study of his chosen profession of the law, Mr. Kent was the pupil of Benjamin Orr, one of the most eminent lawyers of Maine, and of Chancellor Kent, the distinguished legist and legal commentator; and, when, in 1824, he was fitted for practice at the bar, he opened a law office in Bangor, and became the seventh lawyer of the locality. Bangor was, at that time, a promising town of twenty hundred inhabitants, rapidly growing, and Mr. Kent's power and influence grew with its growth.

One of Mr. Kent's first experiences in Bangor he was fond of relating.

In taking a stroll, he reached the Kenduskeag bridge, then an unpretentious structure of wood, about thirty feet in width, having sidewalks, upon which he saw people passing freely. Upon proceeding to follow their example, he was brought to a stand by a shout:—

"Hollo, going to run your toll?" Looking in the direction of the voice, he found it proceeded from a bellicose looking person across the street, standing in a doorway. To avoid a scene, he went toward him, and learned that, as he was a stranger, he was required to pay tribute, to the extent of one cent, for the privilege of passing over the structure, while the citizens were allowed to go free. He decided to become a citizen.

If it were the purpose of this sketch to present Judge Kent otherwise than as the jurist, we should find abundant and rich material of great interest relative to the many offices and relations in public life so admiraby filled by this illustrious citizen and judge, but, pre-eminently a scholar, politician and wit, a man of rare social and intellectual qualities, a man whom the Whig party, had it been in the majority, would have placed in the United States Senate, where his splendid presence, noble oratory and profound political knowledge would have made him of infinite value to his country; but it remained for Mr. Kent, after being governor and consul to Rio Janeiro, to gain distinction and to confer distinction upon the Bench of the State of his adoption.

In 1827, after having served two years in the Court of Common Pleas, he was admitted to practice in the Supreme Judicial Court, and was appointed in the same year, by the governor of the State, Chief-Justice of the Court of Sessions, which office he held from April, 1827, till the close of the

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December term, 1828. And about this time he formed a partnership with Jonathan P. Rogers, lasting, however, only about three years, as, in 1831, he entered, as has been already stated before (p. 62), into a law partnership with Jonas Cutting, afterward Judge Cutting, of the Supreme Court.

Mr. Kent, while increasing in power as a lawyer, gained greatly in popular favor, and was elected to the Legislature as representative from Bangor, in 1828 and 1829, when but twenty-six years of age. This position was followed by his election as mayor of the city of Bangor in 1836, and in the same year by his nomination to the chief magistracy of the State. Mr. Kent was nominated at this time by the Whigs, who were in the minority, and failed at that time to elect their candidate. In the following year, however, Mr. Kent was again renominated, and elected, but so many objections and doubts were raised by the Democratic party as to the result, the matter was finally carried to the Supreme Court and Mr. Kent was declared governor. Mr. Kent was again elected in 1841.

In 1849 Governor Kent was appointed by President Taylor, American consul at Rio Janeiro, which office he filled for four years, after which he returned to Bangor and recommenced the practice of law, in which he continued until 1859, when he was appointed by Governor Lot M. Morrill to a seat upon the bench of the Supreme Court. His former law partner, Mr. Cutting, was among his associates. Judge Kent was again reappointed in 1866 by Governor Cony, and held the position until 1873, when he was succeeded by Judge Peters. He then sought relief from professional duties by an extended tour in Europe. In 1874 he again resumed the practice of law in Bangor, and was engaged in several important cases during the remaining three years of his life.

Governor Kent's action in the vexed question of the northeastern boundary line showed his wisdom and sagacity, and was one of the signal triumphs of his career, at this time, although it was not adjusted until the episode of Maine's history dignified as the "Aroostook War." A brief statement of this boundary question will prove interesting at the present day, when similar questions are being agitated between the United States and Great Britain.

When the treaty of peace was made between Great Britain and the United States in 1783, the English commissioners at first urged that the Piscataqua should form the eastern boundary of the new nation, while the Americans extended their claims as far as the St. John. The St. Croix, however, was finally agreed upon, since the territory lying between this river and the Piscataqua was an acknowledged part of Massachusetts at the beginning of the War for Independence.

The determination of the northern and northeastern boundary was far more difficult. It was provided in the treaty that the line should be run due north from the head waters of the St. Croix, the particular branch not being designated, until it intersected the height of land that forms the divide between the St. Lawrence River and the Atlantic. Thence the boundary line was to run along this ridge until it should reach the sources of the Connecticut. Afterwards, when it came to definitely settling the matter, the English insisted that only the streams flowing directly into the Atlantic were intended by the treaty, and hence that the territory lying north of the height of land that separates the streams that flow into the Penobscot and the Kennebec from those flowing northward and eastward into the St. John belonged to Great Britain. On the other hand the Americans maintained that the Bay of Chaleur and the Bay of Fundy are Atlantic waters, and hence that west of the due north line from the St. Croix, the divide between the streams flowing into these bays and the

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streams flowing into the St. Lawrence, marked the true boundary. The American claim was practically conclusive from the fact that by no other interpretation could the reference to the St. Lawrence have any meaning whatever. After much negotiation between the two countries, in 1827, the question of the disputed boundary line was referred to the King of the Netherlands to determine. His settlement of the matter did not accord with the claims of either nation, and was not accepted by the United States. The Legislature of the State of Maine passed strong resolutions against the decision, and the National Senate rejected a treaty for carrying it into effect.

In 1838 this dispute assumed a serious nature, owing to a conflict of authority between Maine and New Brunswick. The bad feeling that had already long been existing was intensified in 1837 by the arrest, by the authorities of New Brunswick, of an officer sent to the Madawaska region by Congress for the purpose of making a census of its inhabitants and of distributing among them as citizens of the United States their share of the surplus money that had accumulated in the National Treasury, and of which a general distribution was made that year. A few weeks afterward the officer was released, but the excitement in Maine did not subside, and the next year the Legislature authorized the raising of a small force to drive off the trespassers who were cutting lumber on the disputed territory. As a result of this action the governor of New Brunswick issued a proclamation declaring that British territory had been invaded and ordering out a thousand of the provincial militia. The Legislature of Maine immediately responded by ordering a draft of ten thousand men and raising eight hundred thousand dollars for the purpose "of prosecuting the war." Congress also passed an act authorizing the President to raise fifty thousand men to support Maine in case the governor of New Brunswick should attempt to carry out his threat of maintaining exclusive jurisdiction in the debated territory by force. General Scott was also sent to Maine for the double purpose of quieting the excitement and acting as mediator between the State authorities and the Provincial authorities until negotiations with Great Britain could be opened; and also with a view to his acquiring a knowledge of the military situation in case of war.

Finally, in 1842, the present boundary line of the State was decided upon, as a compromise between the conflicting claims, by the Webster-Ashburton treaty, so-called from the statesmen who framed it. By this treaty Maine lost a part of the territory that she had hitherto claimed, but the United States received advantages, in settling the boundary farther to the west, that more than compensated the Nation as whole for this loss, and the commissioners for Maine assented to the arrangement out of regard for the general interest of the whole country.

As a matter of justice, however, the United States assumed the expenses of the "Aroostook War," and paid to the State in addition the sum of one hundred and fifty thousand dollars.

"No portion of the public life of Governor Kent," said ex-Governor Washburn of Maine, in a letter to a friend of Judge Kent, "able and honorable as it was, better illustrates his ability, firmness and patriotism than that which was connected with the exciting and important question of the northeastern boundary. He understood it as few men in the State, and none out of it, did; and under his administration more was accomplished in the way of bringing it to the earnest attention of the General Government and of the nation at large than had been effected for many years. Among the results of this action, the War Department took the matter in hand in earnest, and ordered a reconnoissance to be made to ascertain the military features and resources of the State, and to perfect a plan for its defense, by the establishment of military posts and communications, arsenals, depots of arms, etc. As Governor Kent said in a message to the Legisla-

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ture, the question was lifted from the deathlike torpor in which it had so long rested; a new impulse was given to the cause; for the first time the whole subject was made the formation of a Congressional report, and enlisted in investigation and debate the talents and eloquence of some of our ablest statesmen. . . It was assumed and treated as a national matter, which involved the vital interests of one member of the confederacy, and the plighted faith and constitutional obligations of the Union to make the controversy its own. . . A commission was also appointed by the governor, under the authority of the Legislature, to ascertain and run the boundary line, by whose report the entire practicability of the line is claimed by the State of Maine, and its consistency with the terms of the Treaty of 1783 were established beyond question. 'I confess,' said the governor in one of his messages, 'that my convictions are strong that Maine has been wronged by a foreign government and neglected by her own, and I do not understand the diplomatic art of softening the expression of unpalatable truths.'"

The year of 1840, the memorable music campaign in which General Harrison and Mr. Van Buren were the opposing candidates, Mr. Kent figures in a piece of doggerel which is still sung in Maine:—

"Now, who shall we have for our
    Governor, Governor?
Who, tell me, who?
Let's have Edward Kent, for he's a team
For Tippecanoe and Tyler, too;
    Tippecanoe and Tyler, too.
And with them we'll beat little Van, Van,
    Van is a used up man;
And with them we'll beat little Van."

Maine was at that time the State toward which all eyes were turned. Edward Kent was the Whig candidate for governor, and he came in with such a grand majority that it was easy to know which way the wind was blowing, and the Whigs throughout the country were highly jubilant.

It was one of the incidents of a time of great political excitement, that, in the early fall of 1840, his name passed at once from a State to a national use. It was repeated and republished in every corner and nook of our broad land.

Mr. Kent had been most active in furthering the nomination of General Taylor, and had indeed nominated him at the convention. General Taylor was so far sensible of the service Judge Kent had rendered him that he offered him the mission to Russia, which, however, Mr. Kent declined, as he could not afford it, and took in preference the consulate at Rio Janeiro, because it would give him a good income.

Among the papers of the Judge was found a letter from General Taylor, which I take pleasure in here transcribing:

BATON ROUGE, LOUISIANA,
July 27, 1848.

MY DEAR SIR:—

Your much esteemed favor of the tenth inst. has been received and read with much attention and interest.

Permit me to express the obligations I owe to you for the prominent and active part you have taken in my nomination, and in advocating my elevation to the Presidency both in convention and in your State. I assure you, sir, I feel deeply sensible of the great confidence which your acts and those of your co-operators in the convention have demonstrated for me; in the presentation of my name so prominently to the people of the country with the usual party pledges unasked.

I am fully aware of the efforts that will be made by the party in power to defeat my election, and of course it is to be expected, that I shall in every way be violently and improperly assailed, but I deem it the most prudent and safe course not to notice such assaults. During the canvass I shall govern myself strictly by this principle. Efforts have been made and no doubt will continue to be made to induce the belief that I am opposed to the interests of our adopted citizens, while distorted and erroneous opinions in regard to the "Wilmot Proviso" and the subject of slavery generally will be attributed to me. Without entering farther into these subjects, I am confident that you and the people of Maine understand through my published letters the general and just policy to all sections and interests which would govern me in the event of my election. Most sincerely do I hope that the committee appointed in the Senate,

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to consider the latter subject which I have mentioned, may settle it in a manner equitable and satisfactory to all parts of the Union. It is most gratifying to me to learn that you with others of my friends approve so warmly of the position which I have taken. I shall be most happy and fortunate if my course and position should tend in any degree to modify the bitterness of party spirit or serve to unite the great interests with all parts of our country. I should not forget to thank you for the information you were so kind as to give me of the good feeling towards me in your State. I honor no part of our country, for substantial qualities and patriotism, more than the New England States, and should deem myself greatly complimented to receive the vote of any portion of her citizens. To the State of Maine I feel grateful for the first movement in New England in my favor.

I have but to add that any information or suggestions which you may be disposed to offer to me will be most acceptable.

I am, dear sir, with high respect and esteem,
Your mo. obed't ser't,
Z. Taylor.

Judge Kent sat on the bench fourteen years. It was then the custom to issue one volume of reports each year. Yet I find that occasionally the work of the court in preparing opinions increased the number somewhat from one year to another. Hence the number of volumes containing his opinions, being numbers forty-six to sixty-two, or sixteen in all, overruns the number of years he occupied the bench. He was a ready and easy writer. His style was clear, beautiful, finished, with no trace of haste, strong and eloquent at times. He generally wrote in the traditional judicial style to which the Massachusetts Supreme Court has always adhered; but at times, when the occasion was suitable, his eloquence budded out into rhetorical flowers. His first opinion is in the case of Everett *v.* Herrin, 46 Maine, 557, relating to property exempted from attachment, and holds that a debtor, who is a foreigner temporarily within the State, is not excluded from the benefits of our exemption laws because he is a foreigner. In the same volume, at page 579, will be found his joint answer with Chief-Justice Appleton to the question of the House of Representatives addressed to the court upon the constitutionality of the Personal Liberty Laws of the State — a question much agitated before the inauguration of President Lincoln. As would be believed, these two judges were in perfect accord in their views, and capable of demonstrating, both by principle and precedent, the soundness of their answers. One who believes in human rights reads with pleasure this concluding sentence: "It is due from the judiciary to itself, and to the Legislature, that it should not resort to special pleading nor to strained constructions of the language of a statute, when thereby, and thereby alone, it is to be rendered unconstitutional."

In Felch *v.* Bugbee, 48 Maine, 10, the effect of the insolvent laws of a foreign State upon debts and property within the State is considered fully. It is a much cited case upon the doctrine of *lex loci* and citizenship as affecting contracts. Hinckley *v.* Gilmore, 49 Maine, page 63, involved the right to sell, on a writ and before judgment, the logs attached to enforce a lien. In speaking of the statute, he says: "Those sections contemplate a party, who can and will determine and act from intelligence and according to a formed judgment, and not a mere 'King Log.' . . . In this case, the action had not been entered in court when the appraisement and sale were made. The property attached was the defendant in the suit, and therefore they could not assent to or refuse a proposition to sell by consent. The logs were dumb." There is no sentence in any written opinion quoted more often than the following in Gleason *v.* Bremen, 50 Maine, page 226, an action to recover damages caused by a defective highway: "The traveler has duties as well as the town, and one of the most obvious is to use his eyes to see what is before him on the road, or on its sides, which may require care in passing."

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The Court decided, in Marshall *v.* Oakes, 51 Maine, 308, that where a wife commits a tort in the presence of her husband and by his direction, he alone is liable. In the opinion drawn by Judge Kent, he could not refrain wholly from a quiet bit of humor, and proceeds to say, after reviewing some of the authorities: "How carefully the fathers studied the first case in point, recorded in the history of man (Genesis, ch. iii), or some of the subsequently reported cases, where to common observation the woman and wife appears as the prime mover in wrong and mischief, we cannot know and need not discuss." It was in connection with his opinion in Lemont *v.* Lord, 52 Maine, 365, an exhaustive examination and discussion in admiralty law, that the late Judge Fox of the U. S. District Court said, "When Judge Kent says, himself, he has investigated a question fully and reached a satisfactory conclusion, we all have confidence in his judgment and perfect integrity of decision."

He naively remarks in Barnes *v.* Hathon, 54 Maine, 129, where the defendant had erected a tomb upon his own land within fifteen paces of the plaintiff's dining and sitting-room windows, "It was certainly not a very cheering or exhilarating prospect which met the plaintiff's vision, whenever he looked abroad"; but held in the opinion that the question, whether the structure was a nuisance, should be submitted to the jury. One of his most considered cases and strong handling of legal principles may be found in Warren *v.* Blake, ib. p. 279, an oft-cited authority upon the extinguishment of easements. Smith *v.* Grant, 56 Maine, 255, was an attempt to make replevin of a dwelling-house a substitute for forcible entry and detainer. The owner of the house had given a bill of sale of it and had undertaken thereby to convert his realty into personalty, and the purchaser had ejected the tenant by an action of replevin. The Judge said: "The writ of replevin was never intended as a means of interference with the sanctity of home, and as an instrument to remove summarily a tenant, until removed by due process of law made and provided for such cases."

How far a mortgagor has an absolute vested right, in the methods for foreclosure existing at the date of his mortgage, and can claim that he is not subject to such changes in the method as subsequent legislatures may enact, has been a mooted question. The question received an able exposition by Judge Kent in the Ken. & Port. R. R. case, 59 Maine, 10, and is considered one of his ablest opinions. The proceeding was a bill in equity to reopen the foreclosure of a mortgage given by the railroad, and the bill was dismissed. The case was carried to the United States Supreme Court, which decided (14 Wall. 23), it would not take jurisdiction of State judgments — saying that if the State Court were right in their view of the law as it stood when the contract was made, it is obvious that the mere fact that a new law was made does not impair the obligation of the contract.

True *v.* Telegraph Co., 60 Maine, 15, relates to what are reasonable regulations for transmitting messages, and is among the earliest decisions upon this subject,— holding companies to the rule that there is a limit to their power to avoid all legal liabilities. The opinion contains an elaborate discussion of the principles involved, and is often referred to by other courts with approval. The elements of damage caused by taking land for railroad in R. R. Co. *v.* McComb, ib. 290, is another case frequently cited. The Green will case (Robinson *v.* Adams, 62 Maine, 369), noted for spiritualism as one of the grounds taken by the contestants to the will, who claimed that the testator made her will under the direction of spirits, was a celebrated case; and the opinion, sustaining the validity of the will, was among the last of Judge Kent's judicial labors. It was argued with great

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ability by eminent counsel, among whom was the late Judge Libbey. The following extract from the brief of one of the counsel will indicate the grounds and good sense upon which Judge Kent proceeded to lay down the law in this case: —

"There is much practical sense in the remarks of the London 'Saturday Review' for May 2, 1868, p. 582, upon the case of Lyon *v.* Home, then just argued before Gifford, V. C.: 'It is not necessary to say whether the spirit revelations are, or are not, true. However true they may be, our question is, whether we are to allow them to be other than undue influences?'

"'The spirits may be very virtuous, pious, pure, disinterested and righteous; might arrange mundane things better than we do; but their sort of purity and righteousness is quite incompatible with our poor, unspiritual society, such as it is. And, therefore, we cannot come to an understanding with the spirits. In other words, the Vice-Chancellor will have to notify all and singular, spirits and souls of the righteous and unrighteous, all witches and wizards, ghost and ghost-seers, goblins and mediums, spirit-drawings and airy harps, that deeds of gift, assignments, and wills, dictated by the spirits to rich and silly widows, will be summarily set aside, as transactions which English law and equity decline to recognize.'"

Next to Chief-Justice Appleton, his written opinions exceed in number those of his associates on the bench. A recent examination and comparison disclose what even those who knew him well are, perhaps, not prepared to fully believe, that he dissented very frequently, and often concurred in a separate note. Not that he was contentious, but rather conscientious; preferring to enter his *caveat* whenever he thought he saw deductions or inferences might be drawn afterwards that would not be warranted or supported by the law as he understood it. His dissenting opinions are always dignified and independent; they contained nothing that reflected upon the integrity of the majority; they went directly to the point in plain and simple language that could never offend the most scrupulous in matters of judicial and official propriety. The following extract from his dissent in Dyer *v.* Libby, 61 Maine, 50, affords a good example of his style at such times: —

"The hay was to be delivered at another place as part of the bargain. I grant that it might probably have been delivered at the time of bargain, so as to bind the bargain. But how can it be said, that where there is a contract for the sale of hay, which, by its terms, is not, and cannot be performed until it is hauled to another place, and the buyer is to do something in conjunction with the seller to prepare it for transportation, and does that thing, leaving it for the seller to haul it to the place of delivery agreed upon, that this is such a delivery as takes the case out of the statute?"

Upon retiring from the bench, Judge Kent took leave of his colleagues and the Bar, by an address in which occur these passages: —

"No one who has not held a judicial station can justly estimate the reciprocal influence of the Bench and the Bar. Courtesy, good temper, mutual forbearance and respect, do much to facilitate business and lighten labors. But the influence extends beyond their outward manifestations. There is no judge so able or so learned, who does not need and does not feel the influence and the power and the aid of a learned, upright, and I may add, even persistent counsel; and there is no Bar that does not feel the controlling influence of a just, learned and courteous judge. Each is necessary for the complete working of the judicial department. Human wisdom and experience has found no better and no surer mode of ascertaining truth and administering justice, based on established principles of law, than the *open forum* with an honest, independent and learned Bench, an intelligent jury when needed, and educated, faithful and acute advocates trained in their peculiar duties, to present honestly but thoroughly and earnestly the merits of their clients' cases.

"The value and receptivity of such a Bar in the

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administration of justice between man and man, in protecting innocence, detecting guilt, no reflecting mind can question; and certain I am, no experienced judge can doubt."

This address Judge Kent closed with a courteous welcome to his successor, Judge Peters: —

"And now, sir, I turn to you as my designated successor on the bench. I cheerfully surrender the seat to you, knowing so well, from our long acquaintance, that its duties will be ably, honestly and impartially performed. I welcome you to its labors, its trials, its rewards.

"I commend you most heartily and earnestly to the confidence and respect of your associates, to the Bar, and to the people. And may it be your good fortune, as it has been mine, to enjoy the confidence, the forbearance and the support of your brethren of the Bar, in your constant labors, and efforts to do justice, according to law.

"And after many years, may your exit be accompanied by as many consoling, cheering and gratifying surroundings as mine is. I could ask no more than this for you. I go willingly, for I had much rather depart when some at least are willing that I should stay, than stay till all are more than willing I should depart. . . .

"And brethren, I have detained you too long, but I could not do justice to my feelings, if I had said less. We here part, officially, but I trust we may hereafter continue ever friends, as brethren and associates, at the bar, and in social life. I honor and I love our profession and its members. I ask no higher honor than to be numbered among its true and faithful servants. I now leave the bench and simply ask you to receive me again into your ranks as an honorary, if not an active member."

Judge Kent was possessed of a splendid physique and attractive countenance, and an agreeable manner. He had a clear blue eye, which was undimmed by age; consequently his sight never required artificial aid. He hated drudgery of all kinds, and was disposed to keep all disagreeabilities at a distance. This latter quality is humorously brought out in a personal letter to Chief-Justice Appleton in 1873, in which he writes: —

"A judge who will go into court at half-past eight in the morning of the shortest days of the year, when the sun is just above the horizon, ought to be condemned to hold extra terms under sentence and be thankful if he escapes impeachment on a summary address. . . It may be sport to you, but it is little better than death to the brethren who love a morning nap and a deliberate breakfast. Do you breakfast by candle-light? The single hour at noon may be endured much better, but that is against 'all reasonable rules and regulations' allowed by law. I always think, when I hear of such excessive zeal for unmitigated and unrelieved work, of poor Judge Allen, as I saw him almost running down Broadway whilst the court-bell was ringing and the sun just peeping over the hills and I trying to get my big cloak over my shoulders, having abandoned a half-eaten breakfast.

"I suppose you held Saturday afternoons and were sadly annoyed that the statute forbids holding court Sunday. Don't you think you might hold court between meetings, call it the spiritual court, and devote it to divorces and like spiritual matters?"

During the year that he spent in Europe with his wife and son, he wrote often to Judges Appleton and Cutting, to whom he was so fondly attached by the cords of unbroken friendship. These letters were circulated among friends, who greatly enjoyed their mirth and humor as well as their wit and wisdom. I remember how he described his journey through Italy, and after spending a day at Pisa remarked that he "didn't think much of the Leaning Tower; but it did re mind him of Judge Appleton's charges to the jury in liquor cases."

A lady friend tells me this characteristic incident that happened to him one day when he started out in Florence one morning to visit a picture gallery in which his wife was greatly interested. In her enthusiasm she entered the palace, leading the way to the art gallery, where she soon became deeply absorbed in her study of the great masters, and supposing the Judge was all the while at her side. Turning to ask him to join her in contemplating one of the most beautiful works, she discovered he was not in the room. Retracing her steps she found him sitting on

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the steps of the grand entrance, reading a copy of the Bangor "Daily Whig and Courier" that had just come by mail that day. News from home, he declared, had more charm for him than all the old masters.

I have heard him tell with glee the following incident that took place in a country tavern in Unity, when on his way from Bangor to Augusta to be inaugurated as governor. The stage stopped at Unity for dinner, and when about to start again he called to the landlord from the stage for a cigar. Now the landlord was noted for his kindness and attention to his guests; so he went into the office and having selected the best cigar he had, proceeded to light it himself for his distinguished guest, to whom he handed it from his lips thus prepared for use. The governor was amused, declined the proffered honor and good-naturedly said: "Landlord, before I was elected, I could, perhaps, stand that; but now that I am elected, it's too democratic."

Of all the incidents in his life relating to his friends and his loyalty to them his remark at the dinner table at Portland one day is the most pleasing. It was during a political discussion relating to the influences that govern men in their actions. A gentleman who was then a man of great power and high in influence in the opposite party said: "Any man or politician might be bought." He instantly replied that there was a man in Bangor that could not be bought, and that his name was Allen Gilman. No further conversation in that line ensued, as it was known that the offer of a high office had been tendered to Gilman, with the expectation he would accept it, coming from the gentleman who had made the remark.

There are many anecdotes of Judge Kent illustrative of his wit as a lawyer, and his humor as a story teller. It was perhaps humor rather than wit that he indulged in himself and appreciated the most in others. I have often heard him relate his experiences and tell his stories; but I never heard him tell one that could not be repeated in the presence of children and women.

On one occasion a counselor appealed to the Judge in regard to a difference between him and the clerk in the casting of interest, and he "wanted it right."

"Wherein do you disagree?" asked the Judge.

"He makes it less than I make it."

"What is the difference?"

"Six cents, your Honor."

"Here is the difference. The Court can be better employed than going over that long account for six cents," and the Judge handed him the money.

"I don't want the money," said the counselor; "I want it right."

"Oh, that makes it right," said the Judge, and then turned his attention to other business.

He possessed much literary taste, and contributed to the "Knickerbocker Magazine" and other periodicals besides writing political leaders in his early days.

In 1848, several benevolent ladies of Bangor conceived the projeet of publishing a book, "The Voices of the Kenduskeag," containing original contributions from Bangor writers, for the benefit of an orphan asylum. Judge Kent furnished a humorous paper, entitled "A Vision of Bangor in the Twentieth Century," from which the following extract is a specimen of the Judge's fancy and humor. The paper presented a colloquy between an old man of 1848 and a young man of 1978.

"In an adjoining building was the telegraph office. I looked and saw that instead of wires they had, near the ground, rails of a small size. I asked why this change? and was told they sent passengers on them, driven by electricity, to Boston in four minutes. 'But how can the human system stand such velocity?' 'Oh, we stun 'em,' the fellow said, 'with the Letheon, and then tie them in boxes on little wheels, and they go safely and come out bright.' 'There are rival

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lines,' he continued, 'and great efforts are being made to bring the passage within three minutes, but the passengers all say they will risk anything rather than be beat. We have had to bury a few, but what is that to save time, and beat that rascally opposition line? The people all say, 'Go ahead.'"

During the latter part of his life he was engaged in important cases as senior and advisory counsel, sometimes arguing before the law court, and well employed in office practice. He seemed content, and was always cheerful. I remember how kindly he greeted me in his office in those last days of his life, and what interest he took in all the public questions of the day, loving to discuss them in a most friendly way, and patient with those who did not always agree with him. He then occupied the same office with Judge Godfrey, and could look out on West Market Square — one of the arteries of the city that he knew loved and honored him, and to whose prosperity and renown he had contributed his full share. I recall distinctly the Sunday morning when he was missed for the first time from his favorite pew in the church where for so many years he had been a constant attendant upon the preaching of Rev. Drs. Hedge and Everett, and Professor Joseph H. Allen. He was fatally sick, and soon passed away. He died quietly, sitting in his arm-chair, looking out of his window, just as the morning sun rose above the eastern hills. His cheerfulness did not forsake him during these last days, and he loved to see all his friends, including little children, in his sick-room. One of the latter, a little girl, too young to understand what was the full meaning of the words, when told that he was "passing away," asked him if it was true. Upon being told that it was so, she instantly asked the Judge if he had "got his trunks packed." He delighted in relating the incident almost daily with a smile on his lips.

His death occurred the nineteenth of May, 1877. The Bench and Bar united in appropriate memorial exercises, which are reported in the sixty-sixth volume of the Maine Reports. A beautifully condensed pen-picture of him as a model judge will be found in the following extracts from the eulogy pronounced on that occasion by his friend and associate, Chief-Justice Appleton:—

"A vacancy occurring upon the bench of this court, he was selected with the unanimous voice of the Bar and of the public to fill the vacant seat. With what ability and integrity he discharged the grave duties of that high trust, you well know. In the trial of causes, his greatest anxiety ever was that right should prevail. Patient in investigation, he carefully examined and fully understood the merits of the case before him, and in clear and perspicuous language he endeavored to make the precise points in controversy intelligible to the tribunal, upon which devolved the duty of their determination. Dignified, but not austere, he presided firmly but impartially. He had no favorites. He had no animosities. The young and inexperienced practitioner knew that wherever he presided the just rights of his client would be safe. I well remember, upon his retirement from the bench, how deeply affected, and how profoundly gratified he was at the expression of affectionate regard and of gratitude, from younger members of the profession for his kindness to them in their early professional efforts.

"As a jurist his written judgments will ever command the respect of the profession. While respecting authority, he respected more the great principles upon which authority rests, and without regard to which authority loses its most essential sanction. His decisions rest upon principle and authority — the principle strengthened and confirmed by authority — the authority deriving its vitality from the underlying principle. His mind was singularly free from bias or prejudice. His great purpose was rightly to apply legal principles to existent facts. He spared neither time nor labor in his legal investigations. He discussed legal questions with a clearness of illustration, a strength of argument, a fullness and variety of learning rarely equaled and still more rarely surpassed. His style was clear, lucid and vigorous. Occasionally he was fond of enlivening the somewhat arid discussions of legal principles with

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flashes of wit and humor in which his genial nature so much delighted."

The reader will find a fuller memorial of Judge Kent in Vol. VIII, p. 449, of the Maine Historical Society, and from which I have taken some of foregoing article. It was prepared by the late Hon. John E. Godfrey.

CUMBER v. WANE.

1. Sm. L. C. 366. *Temp. 1719.*

WHO pays a part in lieu of all
Knows not the mystic legal art;
For on him for the rest they fall
Who pays a part.

One *Wane* had touched his *Cumber's* heart.
"Give me a third your debt: I'll call
It settled," said he in the mart;

Yet sued and gained the rest. The hall
Rang loud with plaints: "Ah! well-timed dart!
He pays the rest with rising gall
Who pays a part."

— *Lays of a Limb of the Law.*

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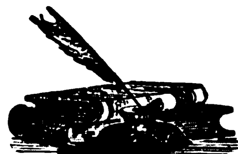
The Lawyer's Easy Chair.



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

. . . . . BY IRVING BROWNE. . . . . .

CURRENT TOPICS.

TOO MANY BOOKS. — The Easy Chair's Christmas season was somewhat burdened and clouded by the anticipation and the advent of the lawyer's unfailing Christmas annuals, "The American Digest" and the "General Digest." Covering twenty-seven or twenty-eight hundred pages each, they lumber up his desk, darken his windows, and if he had to pay for them, would lie heavy on his chest. The entertaining "Book News" says that "the reports are here," and asks us if it is not best to have a comprehensive digest of them. Acknowledging the remarkable enterprise and technical excellence of these compendiums, and their great convenience so long as the present practice of reporting every decision prevails, we still unhesitatingly answer, no. Although our personal living depends in a great measure on this kind of reproduction, we still answer, no. It is a positive misfortune to the legal profession to have so many reports and text-books, and to have access made so easy and convenient to them. In the days of few books there was better and more certain law, and there were better lawyers. Although the writer hereof has had a hand in writing, editing, and compiling more than two hundred law-books, yet he would gladly have them all burned up if all or nearly all the rest could go with them. In every branch this is a book-enslaved generation. Too many books, too many newspapers, too many magazines — too little reflection, too little originality. While thus frankly confessing his own guilt in this matter, the writer would claim a little mitigation of censure because in several instances he has done his best to diminish the number and bulk of law books by compressing the substance of many into one — an attempt at a kind of codification. When he considers the great and rapidly growing evil of the multiplication of law-books and other books, he finds it in his heart to say a word in defense of a famous ancient enemy of books. In recent days it is denied that this personage was guilty of the great act of vandalism traditionally charged to him, but whether he was or was not, the writer is moved to inscribe this

ODE TO OMAR.

I.

Omar, who burned — if thou didst burn —
The Alexandrian tomes,
I would erect to thee an urn
Beneath Sophia's domes.

II.

So many books I can't endure,
The dull and commonplace,
The dirty, trifling, and obscure,
The realistic race.

III.

Would that thy exemplary torch
Could bravely blaze again,
And many manufactories scorch
Of book-inditing men!

IV.

The poets who write "dialect,"
Maudlin and coarse by turns,
Most ardently do I expect
Thou'lt wither up with Burns.

V.

All the erotic, yawping class
Condemn with judgment stern;
Walt Whitman's rotten "Leaves of Grass,"
With elegant Swinburne.

VI.

Of commentators make a point,
The carping, blind and dry;
Rend the "Baconians" joint by joint,
And throw them on to fry.

VII.

Especially I pray thee choke
Law libraries in sheep
With fire derived from ancient Coke,
And sink in ashes deep.

VIII.

Destroy the sheep, don't spare my own —
I weary of the cram,
The misplaced diligence I've shown —
But kindly spare my Lamb.

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IX.

Fear not to sprinkle on the pyre
The woes of "Esther Waters";
They 'll only make the flames burn higher
And warn Eve's other daughters.

X.

Beware of Howells and of James,
O Trollope and his rout;
The first would dampen down your flames,
The other put them out!

"Book-News" recently gave an entertaining chapter on Law-Book Dedications. The Easy Chair has dedicated a little manual, just published, to the aforesaid Omar, using of the foregoing stanzas the first, third, seventh, and eighth, and adding :—

"And spare, oh spare this suppliant book
Against a time of need;
Hide it away in humble nook
To serve for legal seed.

"The man who writes but hundred pages
Where thousands went before,
Deserves the thanks of weary sages,
And Omar should adore."

HANDWRITING. — Every legal practitioner has had occasion to admire or to deprecate the subtlety of experts in handwriting as witnesses. There is no witness wiser in his own conceit, who knows more without being able to give an intelligible reason for it, or who is more liable to be wrong. Experts are the bane of courts of justice, and experts in handwriting are in the front rank of these undesirable and opinionated witnesses. But there is one class of these experts even more fallible than those who go upon the witness-stand. These are the wiseacres who profess to read a man's character from his handwriting. A striking exemplar of this class seems to be J. Holt Schooling, who writes for the "Strand Magazine," taking well known and celebrated men, setting forth their handwriting, and then gravely showing how their characters may be predicated from their handwriting. He may be described as a prophet who foretells past events. His last effort in this direction is an article on the portraits and handwriting of Napoleon. One naturally inquires, if the character is determinable from the handwriting, what is the use of the portraits? It seems that physiognomy is a useful crutch for handwriting. Mr. Schooling also goes considerably into Napoleon's history. So having shown from the facts of his life and the lineaments of his face what a bad and dangerous character he was, he is prepared to disclose his traits from a study of his handwriting! His view of Napoleon's character is such as might have been expected from an English Tory of the year 1820, and quite suited to a man who should now inhabit a little island all of his own. His opinion of Napoleon's face is found in the following: "Indeed, all the portraits which may be considered likenesses suggest a powerful and dangerous member of the actively aggressive criminal class, whom one would probably fight shy of if it were possible to meet him nowadays as one's *vis-a-vis* inside a London omnibus." This of a man celebrated for the classic perfection and beauty of his countenance, shown to special advantage by a reproduction in this very article of the English Captain Marryat's sketch of him as he lay dead! Not one of the pictures selected by this writer but contradicts his assertions. Having thus laid the foundation for his deductions, he proceeds to trace Napoleon's character and career from his handwriting, or his "pen-gesture," as he calls it in the cant of his profession. He has hardly anything but Napoleon's name, in full or abbreviated, or his initial, to show, but this is all-sufficient. When Napoleon is depressed or despondent, it "droops"; when he is triumphant, it "mounts;"—*i. e.*, slants down or up. When he is in a great hurry, or as the professor calls it, abnormally "active," he abbreviates, and when he is at his very worst of tyranny and vindictiveness and triumph, he fairly "stabs" the paper with a "terrific N." As the astute professor stultifies his theories of physiognomy with his portraits, so also he destroys his theory of handwriting by his *facsimiles*; for the very best and most legible of all are those to the immortal letter of surrender to the Prince Regent, the first one at St. Helena in 1816, and that to his will, accompanied by the concluding sentence of that document! The radical trouble with all these wise penmen is that they would test a man's character by his hand as if he always wrote with the same pen and ink, on the same paper, at the same age, in the same health, and in the same circumstances, sitting for a pen-portrait, as it were. Probably every man who reads these lines has seen his own signature — made years before, which he could scarcely recognize; as for example, on a hotel register, his hand tired with lugging his bag, the pen strange, the ink thick, the elevation of the desk inconvenient. Many a man might be sadly misjudged by such a signature. So when Mr. Schooling finds "rage and fury" in the "N" just after Leipsic, he ought to find it in the "N" just after the capture of Paris, but it is singularly calm. No one, however, will gainsay "the most salient quality of Napoleon's handwriting," according to Mr. Schooling — "activity." Napoleon wrote a very "active hand"—it looks frequently as if scrawled by an active spider. Poe, in his writings on autography, says of the manuscript of David Paul Browne: "His chirography has no doubt been strongly modified by

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the circumstances of his position. No one can expect a lawyer in full practice to give in his manuscript any true indication of his intellect or character." Was not Napoleon "in full practice"? (In the regular, neat, and legible hand of Poe one would not detect the half-crazy dreamer of "The Raven.") By the way, Mr. Schooling loses a great and evident opportunity in failing to liken the Emperor to a spider with its craft and venom. Probably all that the great man would say to him would be, "Shoo, fly, don't bother me!" We cordially invite the learned professor to lecture on this side of the ocean, and give us his opinion of Horace Greeley and Rufus Choate and Roger Foster, also of John Hancock, from his handwriting. There would be a lively curiosity on the part of the public here to see a writing-master who sets down the Emperor Napoleon as a "charlatan." We would especially like to show him another handwriting, — very minute, delicate, careful, legible, beautiful — and then exhibit to him the portrait of the writer, with "Grover Cleveland" on it! Professor Schooling would want his passport at once.

"ANCIENT YORK MASONIC ROLLS." — Our excellent friend, Judge Bradwell of Chicago, sends us a comely volume with this title, descriptive of ancient documents in the York Lodge of Masons in England, and of the visit of the Apollo Commandery of Chicago at that venerable seat in 1883. Our brother in law perhaps assumes that this Chairman is a Mason, but he has never been anything higher than a humble hod-carrier who has devoted himself to lugging materials up to the fellows "at the top." But the book is beautiful and interesting, not only to members of the ancient and honorable brotherhood, but to all who have a sentiment for the antique. It is filled with attractive pictures of architectural views in York as well as with portraits of prominent Masons, which include those of the author and his honored and lamented wife. There is also a picture of the Masonic Temple, Chicago, which ought to be thirty-three stories high, but is only eighteen, if our count is correct. The very interesting question whether women were ever admitted to the order is here discussed, with strong leanings in the affirmative, and even an intimation that Abraham's Sarah was a member. (We have always wondered whether Lot's wife was not turned into a pillar of salt for disclosing the secrets.) Judge Bradwell very warrantably argues that women were admitted, from the following language of one of the York Rolls: "he or shee that is to be made Mason shall lay their hands" on the "booke," etc. It is contended on the other hand that "shee" is a copyist's error for "they." This would seem an improbable mistake, and moreover "they" would not only be superfluous but make awkward grammar. The conjunction "or" distinguishes between the sexes or it has no proper office. Most probably it was of old deemed the safer course to admit women in order to save husbands from nagging and to scare the wives into secresy. Now we wish Brother Bradwell would investigate the Morgan case and try to solve that most puzzling mystery. In all the history of crime there is not a case more worthy of the efforts of some modern Poe or Gaboriau or Anna Katherine Green, as an exercise of detective analysis.

HIGH JINKS. — Why cannot we have legal high jinks in this country? They have them in London about Christmas — dramatic, military, etc. On the 6th of December "The Comedy of Errors" — the play, not a lawsuit — was acted at Gray's Inn. The benchers, with the ladies to them appertaining, were present in force; also the Lord Chancellor and the Lord Chief Justice, and judges, and Q. C.'s and Sirs, with their respective ladies; also the preacher (evidently not Solomon) and the reader. That eminent society newspaper, the "Law Journal," informs us: "There was no stage, and the actors appeared through the Tudor doors at the lower end of the hall, and played their parts on the floor level with the spectators. There were no divisions into acts and scenes. The costumes were as far as possible an exact reproduction of the dress and equipment of the period, and the Court and guard of the Duke of Ephesus were a reproduction of those of Queen Elizabeth. In the circumstances, especially the absence of stage and footlights, the representation was a great success, the enunciation of the actors being particularly good." "The piece was brought to a close by the Queen's prayer, taken from the play of 'Ralph Roister Doister.'" There was afterward a supper with archaic music, lutes, viols, and virginals. On December 14, the Bar Musical Society (Lord Herschell, president), gave a concert in the Inner Temple Hall. Then, on December 7, the shooting-prizes won by the Rifle Volunteers of the Inns of Court during the last year were distributed in the Inner Temple Hall by Viscountess Wolseley. Mr. Justice Grantham presided, and made a speech glorifying the history of the corps, but bewailing its diminished numbers. (In the present war-scare they ought to be able to recruit rapidly.) Then the commander-in-chief, Lord Wolseley, made a speech, in which he recommended the corps to improve their shooting, slyly observing "that a body of men who could afford to give away such prizes ought to be able to maintain their corps in a good position" — "a volunteer who could not shoot was an encumbrance to his corps." We have a painful sus-

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picion that the shooting of our London brethren was accomplished after the manner of the Wall Street broker, who put a number of shots into his barn-door, and then painted a target around them. If we were called upon for a toast to the volunteers at this particular time, we would give, "May they never shoot better!" But why do not the members of the New York City Bar Association imitate the example of these scholarly and clever men, and have theatricals and target excursions? We take ourselves too seriously in this country. Nearly all the fun the profession here enjoy is in reading the GREEN BAG. Really, we should have some other resources against the appearance of the big Annual and American digests.

A REMARKABLE APOLOGY. — Our esteemed and always interesting neighbor, the "American Law Review," is one of the very few law periodicals that have the courage of their convictions, and is not much given to apology for uttering them. In fact, its apologies are even more to be dreaded than its denunciations, if one may judge from the following, in the May-June number: —

"After the explanation given by Judge Rose, . . . we must withdraw, with regret, the imputation of ignorance and stupidity which we put upon the Judge, who decided *Ex parte Conway*, in the article referred to." This is almost as ambiguous as the apology said to have been made in Congress: "I said that the member from blank was a hog, it is true, and I am sorry for it."

LAW REFORM WRITING. — The cool reception given by the editor of the "North American Review" to Chief-Justice Appleton's heretical article on Evidence, narrated in a recent number of this periodical, reminds the present writer of his first attempt at law reform. On graduating at the law school in 1858, he wrote a thesis on "Disqualification of Parties as Witnesses," advocating the admission of parties as witnesses in their own behalf in civil actions. The faculty sent it for publication to the "American Law Register," and it was published with the following editorial footnote: "We do not entirely concur with our correspondent, but we present his well-written paper to our readers for their consideration." It was a boyish performance, marked by what Talleyrand would have deemed too much "zeal," but the writer has never found any reason to be ashamed of it, and the views advocated in it, following Chief-Justice Appleton, are not now, and have not for many years been thought extreme in this country, even in Pennsylvania.

NOTES OF CASES.

TRADE MONOPOLY OF A FAMILY NAME. — Recent mention by the "New York Law Journal" (whose selection of cases for comment is always excellent) of Meneely *v.* Meneely, 62 N. Y. 429; 20 Am. Rep. 489, reminds the writer of one of his early professional experiences. The action was brought against his client by his two elder brothers to restrain him from carrying on the business of making bells at Troy, N. Y., in the name of Meneely, because their father had given to the two elder brothers, by will, his old bell-foundry at West Troy, N. Y., and the "good-will" of that business. Fraud and deception were originally charged, but none were proved. In the trial court the plaintiffs prevailed, but this was reversed in the upper courts. The case is the leading one in this country on this point, and although it was an expensive litigation for the young and struggling bell-founder, it proved a most efficient advertisement for him; and his bells, like the morning cannon of Great Britain, now send forth a continuous peal almost around the globe, and his Chicago "Liberty Bell" traverses these States to attend fairs. From the argument of the defendant's counsel we extract the following, never before publicly printed: —

"Now what is this great principle which the eminent counsel is recommending to the favor of your honors? What is the principle for which he invokes the sanction of a court of equity and good conscience? Why, if I understand the counsel, it is just this: If John Smith has made wooden buttons in Troy for forty years, and stamped them 'John Smith,' and acquired a good reputation for them, he has thereby made a trade-mark of the name of John Smith, and acquired a monopoly of that name in the wooden button business at Troy, and no one of the thirty other John Smiths in Troy can thereafter make wooden buttons, and stamp them with his own name in the honest pursuit of that business.

"Is it possible that society is organized on any such inconvenient and precarious basis as this? Are the commercial world the prey of such coincidences? Do courts recognize such a doctrine as pre-emption in patronymics? Can a man 'squat' on his family name? Has Barnum, for instance, acquired a monopoly of the use of that name in the showman's business in New York? Can no other Edwin Booth play 'Hamlet' to metropolitan audiences? Why, such an idea is only fit for a moot-court of lunatics, the realm of feverish imagination, or the kingdom of Utopia. It is just such a doctrine as a judge might dream he had enunciated, if he fell asleep on his back, and had a nightmare, and what a blessed sense of relief he would experience on waking up and finding that it was but a dream! It would be just as reasonable to ask to restrain a man from carrying on business because of a personal resemblance to a rival tradesman, or because of a similarity in advertising, or dressing his shop windows. It is indeed difficult to think of this claim as other than a colossal joke on the part of my friend, and it might be a tolerable jest were it not for the expenses attendant on its perpetration.

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It is at all events a jest quite original with him, for nothing like it was ever heard of before in the history of jurisprudence, and nothing but the eminent standing of the counsel who invents and champions it could secure for it a moment's serious attention, and save it from contempt."

Fraud having been eliminated from the case by the proofs, the counsel likened it to the removal, from the ancient cosmogony, of the tortoise on which rested the elephant which supported the earth. "He goes through the motions of drawing water after the bottom of his bucket has fallen out. He is like the Calvinist, who said in discussion, 'Why, sir, if you take away my total depravity, you leave me nothing to stand on.'"

ELECTRICITY. — In Girandi *v.* Electric Imp. Co., California Supreme Court, 28 L. R. A. 596, it was held that placing electric light wires over the metallic roof of a hotel where persons may come in contact with them, without raising them high enough to prevent such contact, is sufficient proof of negligence in case of injury to a person by an electric shock from such wires; and that want of ordinary care of an employe in a hotel in going out on a metallic roof in a dark night with his employer to secure signs which seemed to be endangered during a heavy rain, and coming in contact with electric light wires which he knew were above the roof, but which he may not have known to be dangerous, is a question for the jury.

The last three decisions illustrate the curious and novel questions with which modern courts of law are called upon to deal. None of these questions bothered Coke, nor Kent, nor any of the great judges who flourished twenty years ago.

CONSTRUCTIVE FLIGHT. — The North Carolina court seems to be in a little trouble with itself about this subject. Comment has been made on its decision in the Hall case, where it held that if a man stood in North Carolina and fired across the boundary and killed a man in Tennessee, he was not so constructively present in the latter State as to warrant his extradition thither for trial. (115 N. C. 811; 28 L. R. A. 289.) But now they hold that the departure of one to his home in another State after making criminally false representations, in reliance on which the goods were subsequently delivered to a common carrier and shipped to him, is within the law a flight from justice for which he may be surrendered on a requisition. In other words, a man may "fly" without knowing or intending it. If this is right, and very likely it is, there is such a thing as constructive flight, and if so, why should there not be such a thing as constructive presence?

EXPERIMENTS IN COURT. — A case that may be added to the collection on demonstrative evidence made some time ago in this periodical, is Libby etc. *v.* Scherman, Illinois. It appeared that the plaintiff was working in a packing-house alongside large piles of barrels full of pork. One of the barrels located about the centre of one of the piles leaked and the foreman of defendant knocked in the head of the barrel and had its contents removed, leaving the empty barrel in its place in the pile. Shortly thereafter the pile gave way at this place and one of the falling barrels injured plaintiff. Defendant offered to prove by witnesses who made experiments that an empty barrel located as the one in question could be taken out without causing the pile to give way and that the head of a barrel located relatively the same as the one in question could be knocked out and its contents removed without affecting the stability of the pile. — *Held:* that the court properly rejected the proffered testimony. The court said: —

"We are clearly of the opinion that experiments of that character, and their results, and inference drawn from them by witnesses, were mere collateral matters which could have no legitimate bearing upon the issues before the jury. Besides the impossibility of showing that the conditions under which these experiments were made were in all respects identical with those existing at the time the plaintiff was injured, and the multitude of collateral issues which an attempt to prove identity of conditions would raise, the fact that one experiment had been conducted to a successful issue would have little if any tendency to show that in another case precisely like it, an accident might not happen. A thousand men may pass an impending wall with safety, or at least without injury, but the next man who attempts to pass it may be crushed by its fall. The question is not whether a pile of barrels might not stand with an empty barrel situated as was the one in this case, but whether leaving such barrel in the condition shown rendered the support of the barrels above it less secure, and that to such a degree as to constitute negligence, and whether the plaintiff's injury occurred as the result of such negligence."

MASTER AND SERVANT — TERM OF HIRING. — The New York Court of Appeals, in the recent case of Martin *v.* New York Life Insurance Company, have held that —

A general or definite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof; that

A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for the time actually served, and

Accordingly, that a contract to pay the plaintiff

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$10,000 a year salary, payable monthly, no time being specified, was a hiring at will and could be terminated by the defendant at any time; that the fact that the compensation was measured at so much a year did not make the hiring for a year, and the plaintiff being discharged before the end of the year could only recover for the time actually served.

The Court said: —

"The learned counsel for the plaintiff argues that a general hiring means, as matter of law, an employment from year to year, and insists that his proposition is sustained by the decision of this Court in Adams *v.* Fitzpatrick, 125 N. Y. 124.

"The case cited does not decide the point in question, although certain expressions in the opinion and reference to English cases might seem, upon a casual reading, to justify a contrary contention.

"The referee found however that the parties originally contemplated a hiring for a year, and this Court held that on the continuation of the employment after the expiration of the year, without further agreement, it would be presumed that the parties had assented to renew the contract for a like period.

"The present condition of the law as to the legal effect of a general hiring is thus stated by Mr. Wood in his work on Master and Servant (2d edition), section 136, as follows: 'In England it is held that a general hiring, or a hiring by the terms of which no time is fixed, is a hiring by the year. . . . With us, the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will; and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. . . . A contract to pay one $2,500 a year for services is not a contract for a year, but a contract to pay at the rate of $2,500 a year for services actually rendered, and is determinable at will by either party. Thus it will be seen that the fact that the compensation is measured at so much a day, month, or year does not necessarily make such hiring a hiring for a day, month, or year, but that in all such cases the contract may be put an end to by either party at any time, unless the time is fixed, and a recovery had, at the rate, fixed for the services actually rendered.' The decisions on this point in the lower Courts have not been uniform, but we think the rule is correctly stated by Mr. Wood, and it has been adopted in a number of States (Evans *v.* St. L., I. M. & S. R'y Co., 24 Mo. App. 114; Finger *v.* Brewing Co., 13 Mo. App. 310; De Briar *v.* Minturn, 1 Cal. 450; Haney *v.* Caldwell, 35 Ark. 156, 168; Prentiss *v.* Ledyard, 28 Wis. 131)."

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The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor,
HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

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

THE GREEN BAG.

EDITOR OF THE GREEN BAG: —

Sir: — Your "Disgusted Layman" was certain, as soon as he saw that there was litigation as to whether the owner, or the tenant of a farm, owned the aerolite which fell on it, that a guessing school would be nowheres beside the decision on *that* point, and on looking up the case (86th Iowa Reports, page 71) found he was exactly correct. Upon applying his lay wisdom to the case, the arguments, the cited authorities, and the decision, he finds that each side exactly balances the other, and therefore that flipping up a copper would be the most satisfactory determination of the matter.

However, there is one ancient principle overlooked by the Supreme Court of Iowa that should have determined the decision in favor of the tenant and not the owner, as the Court decided. "The boys" have a principle of their "Common Law" running "Losers seekers, finders keepers," and that is always upheld among the boys (when the finder is the bigger boy).

However, to be serious, there is a most charming bit of manly frankness in the conclusion of the decision, wherein the Court says it don't know whether it is right or not, but it guesses it is,—an honest admission of the insufficiency of human acumen to grapple with every subject under the sun that is refreshing.

YOUR DISGUSTED LAYMAN.

LEGAL ANTIQUITIES.

THE title Cancellarius or Chancellor, according to the opinion of some of our older writers, arose in the following manner. The Referendarius (or Referee) and his clerks being besieged by people wishing on divers grounds for the king's interference either in civil or criminal matters, for the rehearing of causes in the one case, and for the obtaining of pardons or the releasing of penalties in the other, were separated from the suitors, like the officials in a Basilica or Roman law court, by an open grille or lattice. This lattice-work was formed by laths called *cancelli*, or little bars, and the clerks and others who sat behind the lattice and took in the plaints were then called the clerks of the Cancelli or Chancery. When the name of Chancellor was actually given to this officer seems to be subject to some doubt. The first occasion upon which the name is definitely ear-marked as attached to the office is during the period of the Confessor.

FACETIÆ.

WHAT crime involves the least risk?
A *safe* burglary.

WHY are oysters poor lawyers?
Because they lose all their cases as soon as they come to the bar.

AT a western law-school, a reformed Scotch-Presbyterian preacher — reformed, that is, from theology to law — was asked to define "Embracery." He somewhat astonished the professor and the class by answering that it was "a species of assault on a woman."

A PHILADELPHIA baker who kept no books, offered a chalk tally of loaves furnished a customer as proof in a suit. The attorney for the defendant jocosely asked if the evidence was offered under the *lex talionis*. To this the counsel for the plaintiff responded that he only offered the *tally*, the *onus* was on the defendant to prove its invalidity.

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NOTES.

THE following unique "Confession of Judgment" was drawn up by a clerk in a law-office in Buffalo, after he had mislaid a form of confession given to him to have executed. The document as reproduced by him from memory was actually executed. It is well worth preserving: —

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING; — IN THE NAME OF GOD, AMEN.

I, —— as contractor and builder, in the —— of ——, N. Y., being of sound mind and memory, and desirous of paying a part of my just debts and liabilities, do hereby, in consideration of the sum of one dollar to me in hand paid and other good and valuable considerations, confess judgment in favor of —— of said ——, for the sum of $—— being the amount of his claim against me now due and owing, and do hereby renounce, release, transfer, assign, and set over unto them all my defences against said claim of every nature, good, bad, and indifferent, and do hereby authorize them to issue executions thereon either against my property or my body, but not both in the United States and Canada, and for the same consideration I do hereby revoke and cancel all former judgments entered against me and all gifts, devises, and conveyances fraudulent and otherwise heretofore made by me, it being publicly declared intention to make the judgment hereby confessed a first and supreme lien upon all of my property, both real and personal which I ever had, now have or hereafter may, shall or can have from the beginning of the world to the date hereof.

Witness my hand and seal
this —— day of —— —— ——
(L. S.)

County of Erie, } ss.
City of Buffalo, }

—— being by me severally, personally, and individually sworn, but in his character of contractor and builder, however, doeth depose and say that he acknowledges all due executions of the foregoing instrument with the same force and effect as if it were a deed or conveyance or last will or testament.

—— ——
Commissioner of Deeds,
in and for ——, *N. Y.*

THE late Judge Rosecrans, of Saratoga County, N. Y., possessed a most brilliant intellect, and could, if he chose, so charge a jury as to almost certainly defeat either litigant that he desired without giving the most astute lawyer any good ground to take exceptions to the charge.

An old farmer residing in his county at one time had, growing *outside* of his door-yard fence, and really in the ground belonging to the road, or highway, a gigantic chestnut-tree. For years the farmer had honestly supposed that the nuts that grew on this tree belonged by lawful right to him, and he had gathered them accordingly. One day two stalwart butchers, out on a calf-buying expedition, came along and began to collect the nuts that hung plentifully in their burrs on the tree. Naturally the farmer objected to this, and went out and forbade them. Words followed, and an altercation ensued, in which the farmer, although a smaller man than either of his antagonists, gave them both a terrible drubbing.

They, knowing him to be amply able to respond in damages, brought suit for damages for assault and battery. The case came on to be tried before Judge Rosecrans, and he, thinking that the farmer ought not to be punished, proceeded to charge the jury something in the following manner: "Gentlemen of the jury, I charge you as matter of law that this defendant was not the owner of the nuts growing on this tree, and had no more right to them than the plaintiffs had; and, therefore, they are entitled to damages for the assault made by him upon them. The only remaining question, then, is one of damages. This is entirely for you to determine. The evidence shows that at the time he began the assault the plaintiffs had gathered about a hatful of chestnuts with the burrs. Now I further charge you that in estimating the amount of damages to which you may think the plaintiffs entitled, you have no right to set off against the same the value of the chestnuts so gathered, *even if you think the damages shall amount to so much as the value you may put upon the chestnuts.*"

The jury brought in a verdict of damages for plaintiff in the sum of *six cents.*

LITERARY NOTES.

MR. DAVID A. WELLS continues his account of of "Tax Experiences of the Federal Government" in APPLETON'S POPULAR SCIENCE MONTHLY for January, devoting especial attention to the reforms in internal revenue taxes made immediately after the Civil War, and some of the curious facts that they brought to light.

DURING the closing weeks of 1895 the daily papers have published an extraordinary amount of interesting and important news. It is worth something to the busy newspaper reader to have this mass of information taken up, arranged, digested and reviewed

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in a calm and intelligent manner. The REVIEW OF REVIEWS performs this service very efficiently every month. The number for January, 1896, is especially strong in this respect. The editorial department, called "The Progress of the World," is distinguished for its able handling of national and international topics of the hour. In fact, the REVIEW occupies a unique position as a truly "international magazine." Its soundly "American" stand on the Venezuelan question is significant.

THE installment of President Andrew's History in the January number of SCRIBNER'S MAGAZINE deals with Cleveland's first administration, and is called "A Democrat at the Helm." In addition to its political features, which are very interesting, this article contains an admirable summary of the Chicago anarchists' plot, and also of the presentation of the Bartholdi statue to New York. It is most beautifully and profusely illustrated.

A NEW biography of George Washington, by Professor Woodrow Wilson, of Princeton, will be a feature of HARPER'S MAGAZINE during 1896. The first paper, which appears in the January number, treats of the conditions of the colonies, with especial reference to Virginia at the time of Washington's birth. The paper is fully illustrated with the earliest known portrait of Washington, five drawings by Howard Pyle, and other pictures.

THE first issue of the ATLANTIC MONTHLY for 1896 opens with an unpublished Note Book of Nathaniel Hawthorne, now printed for the first time. There are also the opening chapters of a new three-part story by F. J. Stimson (J. S. of Dale) entitled "Pirate Gold." It deals with romantic Boston life in the fifties.

Two political articles will be sure to attract attention, "The Emancipation of the Post-Office," by John R. Procter, Chairman of the United States Civil Service Commission, and "Congress out of Date," the latter being an able statement of the evils due to the present system of convening Congress a year after its election.

THERE is but one collection of the portraits of Lincoln that pretends to be complete, and that is the collection made by the publishers of MCCLURE'S MAGAZINE. They have been able to secure either originals or copies of every photograph, daguerreotype, ambrotype, drawing or painting of Lincoln, so far as known, in existence. There are in this collection fifty photographs, ambrotypes and daguerreotypes.

The entire series of portraits will appear during the current year. With the February number twenty of them will have been printed.

These portraits cover a period of about twenty years, are from originals taken in a great many different towns and cities under a great many different conditions, and are so varied, and present Lincoln under so many different aspects, that the result of the whole collection is to make Lincoln vivid and real; so that even those who never saw him can form a very accurate idea of how the living man looked and acted.

BOOK NOTICES.

LAW.

THE LAW OF COLLATERAL AND DIRECT INHERITANCE, LEGACY AND SUCCESSION TAXES. By BENJ. F. DOS PASSOS. Second edition. West Publishing Co., St. Paul, 1895. Law sheep. $6.00.

The adoption of statutes directing the collection of collateral and direct insurance tax by so many States, since the first appearance of this work, has made a new edition very timely. Mr. Dos Passos has collected and collated all the various decisions and statutes upon the subject, and the treatise is one which should find a place in every lawyer's library.

PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT. By SIR WILLIAM R. ANSON, Bart., D.C.L. Eighth edition. First American copyright edition. By ERNEST W. HUFFCUT. Macmillan & Co., New York, 1895. Cloth. $3.00.

Anson on Contract is too well known to need any special words of commendation. With the American cases cited by Mr. Huffcut, the present edition is rendered much more valuable for the lawyer and the student, and should be heartily welcomed by both.

RECOLLECTIONS OF LORD COLERIDGE. By W. P. FISHBACK. The Bowen-Merrill Co., Indianapolis and Kansas City. 1895.

This is one of the most delightful books we have read for a long time. Mr. Fishback met Lord Coleridge under the most auspicious circumstances and had opportunities for seeing him in both public and private life accorded to few Americans. His reminiscences are highly interesting and entertaining. The lawyer is given a good insight into English methods of legal procedure, while the layman will find an ample supply of social gossip. The book is charmingly written, and there is not a dull line in it from beginning to end.

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American State Reports. Vol. XLV. Containing the cases of general value and authority decided in the courts of last resort of the several States. Selected, reported and annotated by A. C. Freeman. Bancroft-Whitney Co. San Francisco, 1895. Law sheep. $4.00.

This series maintains its high standard. Selections and annotation are excellent. In the present volume fourteen States are represented by the cases reported, and these cover many important decisions.

Elements of the Law of Agency. By Ernest W. Huffcut. Little Brown & Co., Boston, 1895. Cloth. $2.50 net.

If the coming lawyer is not well grounded in the principles of his profession, it will not be for the lack of admirable text-books. This work of Mr. Huffcut, the latest addition to the Student's Series, is an accurate and reliable exposition of the law of Agency as related to Contract. The citations are numerous and to the point, and the author is to be commended for the clear and succinct manner in which he presents his propositions. We commend the book to the careful consideration of our law teachers and advise its use by all students.

Negligence of Imposed Duties, Carriers of Freight. By Charles A. Ray, LL.D. Lawyers' Co-operative Publishing Co., Rochester, N. Y., 1895. Law sheep. $6.50.

This treatise is an exhaustive statement of the law of Carriers of Freight, and as such will be of much value to corporation lawyers and transportation officials. The subject is clearly and thoroughly treated by the distinguished author and the work can be relied upon as a trustworthy guide.

A Treatise on Land Titles in the United States. By Lewis N. Dembitz, of the Louisville Bar. West Publishing Co., St. Paul, 1895. Two vols. Law sheep. $12.00 net.

All lawyers will heartily concur in the author's hope that, by the demonstration of the diversity and uncertainty of American law on questions affecting land titles which his work affords, some impetus may be given toward concerted effort to remove these defects. In this treatise Mr. Dembitz has collected and classified the decisions and statutes of nearly all the States. The task must have been an arduous one, but the result is eminently satisfactory. To the practising lawyer and conveyancer the work will be of the greatest assistance.

Outlines of Legal History. By Archer M. White, of the Middle Temple and of the Midland Circuit. Macmillan & Co., New York, 1895. Cloth. $2.00.

This is a capital book for those desiring to obtain an elementary knowledge of Legal History. Sketches are given of the different English Courts, and the various Saxon and Norman legal systems are clearly described. The author also goes into general legal matters, such as Attainder, Extradition, Habeas Corpus, Judges, Jury, etc., and besides gives a brief outline of Common Law and Equity and Criminal Law. Although designed "to interest the student in the dry bones of past periods of legal evolution," the book will be found to possess much real interest for the full-fledged lawyer.

Handbook of the Law of Torts. By Edwin A. Jaggard. West Publishing Co., St. Paul. Two vols. Law sheep. $7.50.

This latest issue in the "Hornbook" series is altogether the best which has yet appeared. Professor Jaggard treats his subject admirably and writes as one can only after the most thorough research and familiarity with his theme. He has ideas of his own which are refreshing in these days when most of our lawbooks consist merely of the compilation of Court decisions. For lawyers as well as students the book is a most admirable one.

American and Corporation Reports. Vol XI. Edited and annotated by John Lewis. E. B. Myers & Co., Chicago, 1895. Law sheep. $5.

This excellent series of Reports is kept up to a high standard by the editor, and is invaluable to corporation lawyers. The latest decisions relating to corporations of every description are accompanied by full and valuable annotations.

Introduction to American Law. Designed as a first book for students. By Timothy Walker, LL.D. Tenth edition. Revised by Clement Bates of the Cincinnati Bar. Little, Brown & Co., Boston, 1895. Law sheep. $6.00.

For a thorough understanding of the elementary principles of American Jurisprudence, the student can find nothing better than these lectures. Since the first edition appeared in 1837, the excellence of Mr. Walker's work has been recognized, and successive editions have only served to increase its popularity. The present volume has very considerable additions in the way of notes.

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Wm. M. Evarts

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The Green Bag.

Vol. VIII. No. 3. BOSTON. March, 1896.

WILLIAM M. EVARTS.

By A. Oakey Hall.

WILLIAM M. EVARTS is the survivor of all the judges, and of the large assemblage of lawyers whom he faced upon his first argument in the newly established Court of Appeals of the State of New York, and in the first year of its existence. He was then thirty years of age, the model of a "thin, angular, pale-faced New Englander"; and, to paraphrase Shakespeare, with an evident "native hue of resolution sicklied o'er with the pale cast of thought, ready for enterprise of great pith and moment." He then had a general appearance which, while somewhat afterwards modified by time, he never lost. And in his daguerreotypes taken then — in 1848 — may be perfectly traced the face and figure of the photograph of 1893. But while the latter exhibits wrinkles, and while Father Chronos has thinned his flowing locks of the former period, the photograph yet shows the kindling glance of youth and the determined face which attracted attention while he was a Boston schoolboy, or a first-class at Yale, or in the Cambridge law school, a rapt listener to his professors, Joseph Story and Simon Greenleaf.

That first Court of Appeals argument was in the case of Walworth — representing cestui que trust plaintiffs *v.* the Farmers' Loan and Trust Co. of New York City; reported in volume first of the Court's reports.

When he then arose to make his maiden argument in that court wherein he was destined to contract a legal fame, in after years, second to no one at the Bar, he must have stood among and been listened to by a grand array of the State Bar. The court was new, and through an interregnum between the destruction by the Constitution of 1846 of the former Court for the Correction of Errors, and through the establishment of this new appellate tribunal, the calendar of the latter was a remarkably full one, and had throughout its initial year daily attracted a large delegation of advocates. Doubtless among his legal listeners on that occasion were the elder Rufus W. Peckham; Ambrose L. Jordan, master of withering sarcasm; Charles O'Conor, in his prime of defiant attack; Nicholas Hill, Jr., who had just surrendered office as reporter of the predecessor court; William Kent, whose recent judgeship the new Constitution had taken from him; young Samuel J. Tilden, the philosophic; Francis B. Cutting, whose cross-examinations and repartees realized his surname; the lovable Henry S. Dodge; the impetuous Hiram Ketchum; the sweet-voiced Ward Hunt, destined for the Federal Court at Washington; the arrogant Sam Stevens; the quaint Marcus T. Reynolds; Ned Sandford, whom attorneys nicknamed the slasher; Sam Sherwood, the acute; Willis Hall, apostle of municipal law; George Wood, the encyclopædic; the legal preceptor of Mr. Evarts, Daniel Lord, whose junior to his name reminded of divinity which shone reflected in his pure life; George Bowdoin, the life of clubs as of the circuit mess-room, and the lawyer of society; John A. Collier, the Cicero of Western New York; Nathaniel Bowditch Blunt, named after the famous writer on marine navigation, and himself a

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keen navigator of the tortuous channels of *nisi prius;* John H. Reynolds, the New York Erskine; Henry G. Wheaton, the silver-voiced orator; John K. Porter, the trenchant; Henry E. Davies, the synthetic; Andrew S. Garr, the special pleader Chitty of America; James W. Gerard, the elder, whose incessant humor was as dignified as fresh and illustrative; Henry C. Murphy, the fertile in expedients; Francis Kernan, the analyst; Benjamin D. Noxon, a modern Coke; Benjamin W. Bonney, a curious compound of mildness and severity; and William Curtis Noyes, who was the opponent of Mr. Evarts in the argument mentioned. All only living now in the reports.

And were present also the "not dead but gone before" judges of that occasion, Greene C. Bronson, Addison Gardner, Charles H. Ruggles, Samuel Jones the second, William B. Wright and Chief-Judge Jewett. All those are names that even the lawyers of this generation love to conjure with among themselves.

Of those named among lawyers and judges, three were destined to ascend the bench of the Court; one of them to be a predecessor of the then young Evarts in the Senate; one to be an unsuccessful candidate for the Presidency; three destined to Congress; and all to be followed to their graves by revering associates fond of their fame.

I have chosen to date the legal career of Mr. Evarts from that argument because it was in a case which attracted much legal, commercial and social attention, and presented novel points. Beneficiaries of a life and remainder testamentary estate possessed funds deposited in Chancery to a large amount, which had been loaned for investment by the Chancellor's order, and for which a bond and mortgage had been taken. The clerk of Chancery, a relative of the Chancellor, without due order had satisfied the mortgage in order to novate it with another mortgage. On the foreclosure of the latter, the owners of the funds discovered a deficiency which brought up the question of the validity of the substitute mortgage, and whether the first did not still stand as security for the fund. Upon these facts Mr. Evarts made a most ingenious argument, taking for his point the equity of marshaling securities and for making the first mortgage still available. But although he lost, yet the opinions show that his authorities had evidently much worried the judges in their consultation room.

But he had already been in practice seven years, and had then attracted marked attention by his assiduity, pleasing social manners, and business connection through friends of his father. And a few words about him who gave inheritance to his son of industry, method, philanthropic influences, strong ethical leanings, love of literature, hatred of wrongs, pure Saxon style of composition and a taste for legal pursuits. Bostonians may purchase a biography of this Jeremiah Evarts, for on his death in 1831, when his son William was yet a grammar-school pupil, his friends deemed him worthy of a commemorative volume. He was a Vermonter, which accounts for the purchase by the son in his advancing age of a charming estate in that State for purposes of summer rest and seasonable relaxation. The sire graduated at Yale when the century was only two summers old. After taking degree he taught school three years, the while studying law; then practiced his profession under shadow of New Haven elms a short time, but went to Boston in order to edit a religious monthly called the "Panoplist," or armor of defense, in which pursuit he continued until 1821, while his son was an urchin of three years. Then he accepted office as treasurer of the American Board of Commissioners for Foreign Missions and merged his own magazine into one projected by those commissioners, and still known as the "Missionary Herald." He was a marked philanthropist, an original Anti-slavery man, and so great a friend of the then persecuted red man of the far

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West as to write essays, pamphlets and a volume upon their wrongs, with suggestions as to Federal remedies. His mind, however, was stronger than his body, and falling into loss of health, he died in the South while there seeking restoration. But he left estate enough to provide William with his course at Yale and in the Harvard law school.

At Yale the latter measurably followed in some of his father's footprints by founding, as inheritor of his father's journalistic proclivities, the "Yale Literary Magazine." After receiving the diploma of LL.B., which bore the now greatly valued autographs of Story and Greenleaf, he took in New York, in 1841, his diploma as practicing attorney, and three years later, under then existing rules, another as counselor. While yet a law-student he took relaxation in the Tippecanoe and Tyler campaign of 1840, and attracted much attention from eminent leaders in the Whig party of the period by his cleverness in putting the political topics centering upon the protective tariff, and the extravagance of the opposition administration. Even at that early age he exhibited the consummate raillery which marked so many of his later efforts in oratory.

It was observable by both Bench and Bar, during his legal novitiate as advocate, that he possessed in a remarkable degree a presence of mind and a *sang froid* seldom noticeable in a young lawyer. "This young Bay State boy has come to stay," was a remark attributed to the venerable circuit judge Ogden Edwards, who had listened to a motion for non-suit made by the boy. And Judge Edwards was one of those nonchalant judges who disliked non-suits, and preferred to place responsibilities upon juries and motions for new trials.

The Evarts preceptor, Daniel Lord, was pre-eminently what is best known at the British bar as a lawyer of families and estates. Of controversies among these there was an overflow from the Lord office, and some of it went to Evarts when he "hung out his shingle." He possessed so youthful an appearance that it is no wonder Judge Edwards referred to him as "this Boston boy." Always smoothly shaven, and with what this generation knows as football hair, also an attenuated but lithe form which scarcely weighed one hundred and twenty pounds, he seemed more juvenile than he was. Athletism had not infected Yale nor Harvard when he was at either, and he had never been called upon to develop muscle. It was intellectual fibre that had been mainly exercised at those historic schools, and at no period of his life did he develop into physical sturdiness. Yet he was never a weakling. Somebody once referred to Daniel Webster as a "steam engine in breeches." I should paraphrase my recollection of Evarts in 1848, when I came to the Bar, so as to describe him as a tug-boat in a black frock-coat that hung upon him as if it were a Ciceronian toga.

The lawyer lingering in any library can readily trace the Bar progress of Mr. Evarts after his debut in the High Court of Appeals through the early reports, of Sandford's Superior Court Reports, and Barbour or Howard's Supreme Court Reports, and in them will discover that if the briefs of other lawyers are slighted, his and his authorities never were.

In 1850 he acquired a national reputation through a speech which he made at the first Union meeting ever held in New York. This was in Castle Garden, at the time when the Clay-Fillmore compromises about territorial slavery were to the fore. There were then mere mutterings about secession in Washington and elsewhere, and these formed the topics of Mr. Evarts' rebukes. Veiled those were in guarded language, for Fate was reserving to the Fremont and Lincoln periods of his after-career opportunities for his slashes at Calhounery and slavery. Not even Alexander Hamilton's early revolutionary public speeches in his younger

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days on the turf of the New York commons excited more popular attention than this speech. Simeon Draper, afterwards Lincoln's Collector of the Port, and then chairman of the local Whig party, was heard to exultingly say at the finish of the meeting: "Boston may have its Webster and Choate, but New York has now their compeer in young Bill Evarts." In the Taylor and Fillmore campaign Mr. Evarts was again to the fore so much as a Whig orator that this political prominence called him in 1849 to become statutory assistant to the Federal district attorney, Jonathan Prescott Hall, who, long deceased, lives in legal annals as reporter of three volumes of Superior Court reports. In that capacity Mr. Evarts continued until 1853. It was at that period I made his acquaintance, as I held the similar position with the county district attorney, and we became brought together professionally. Prescott Hall was a society man, and constitutionally indolent, which proved a boon to his assistant, because it threw him more actively into the legal fray; so much so, that when the Cuban filibusters of 1851 were, in deference to treaty with Spain, prosecuted for infringement, on board of the schooner "Cleopatra," of the neutrality law, Assistant Evarts was given exclusive control of the case for the Government, and against the sympathies current among the jury panel he obtained a conviction. I attended, for purposes of studious observation, the close of the trial, and I recall the big head on the spare shoulders, the nervous energy pervading every part of his gaunt countenance — such an one as the London caricaturists award the traditional spare figure of Brother Jonathan, and the slender, almost shrunken, arms that rose and fell in apt, angular gesture. But I forgot the slender figure while listening to the fine robustness of his argument and the plumpness of his unanswerable, logical positions. Federal District Attorney Prescott Hall, throughout his official administration, seemed to the public to be the assistant, and Evarts the chief.

For several years politics was laid aside on the Evarts shelf, and he devoted himself assiduously to his profession. One of his specialties became the furnishing of opinions to corporations whenever their directors were puzzled with possible legal complications. It really became a fashion in Wall St. to say, "Well, let us take Evarts' opinion." I have seen him at a dinner party dexterously cut a pineapple — no ordinary feat to do well. Evarts cut into a hard legal problem as he would cut a pineapple — laying aside deftly the skin and rind, and getting at once into the pulp and juice of the controversy, and then sugaring it with clear style. A client might say of one of his opinions, "I do not care so much for his conclusions as for the reasons he assigns in reaching them." In speaking, Mr. Evarts often had queer involutions of sentences, but in composition these were never complicated nor confusing, but were as clean cut as an essay by Lord Bacon.

He began legal life on the Daniel Websterian principle that a lawyer should never cheapen his services; and he always made heavy charges. David Dudley Field was then another lawyer who believed that the laborer was worthy of — as he humorously phrased it — his higher; and I have heard that American Justinian say, "a client is apt to pecuniarily take your services at your own valuation of them." In one case within my personal recollection, Mr. Evarts, in a railway controversy, received $20,000 for one opinion. And it was always an open secret that judges, when they would decide an appeal in his favor, freely used his brief, even in its verbiage. That was always of the best Anglo-Saxon, and if specimens of it are desired, these will be found in his eulogy on Chief-Justice Chase, before Dartmouth College, in June, 1873; or in his oration at the Philadelphia Centennial of 1876; or at the unveiling of the Seward statue in Madison

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Square, New York, or when the Bartholdi Statue of Liberty was unveiled in the harbor of that city.

Here it may be appropriate to refer to him as an orator. He was never eloquent in the popular sense which applied itself to Patrick Henry, James Otis, William Wirt, Webster, Rufus Choate, and Sargent Prentiss. Mr. Evarts lacked the emotional part of these orators, and sometimes their graces. But he was equally, perhaps more, convincing. He never sacrificd matter to manner. Even in conversation he was syllogistic. His voice lacked flexibility and variety of tone. But any such deficiency was compensated by the earnest furrows of the face and the actual gesture of his eyes. It was impossible for him to advocate a bad cause. He impressed jurymen and judges with the strong fact that he ethically believed his assertions. Had he been St. Paul before Agrippa, I fancy that this king would have altered the Biblical saying, "with but little persuasion thou would'st fain make me a Christian," into "with thy great persuasion thou hast now made me a Christian." Therefore, for the word orator must be descriptively substituted, in Mr. Evarts' career, that of persuader, because he was eminently such. For instance, in the great Parish Will Case he was pitted against that matchless orator, Ogden Hoffman; but while the latter mostly delighted the judge, Evarts mostly persuaded him.

The Fremont campaign of 1856 again pressed Mr. Evarts into politics. Therein he wandered into genuine emotion. The philanthropic impulses of his father were restored to him. His objurgations against human slavery approached the region of passion. That topic was also the only one that ever inspired William Henry Seward into any semblance of passionate eloquence; and in this matter of public speech he and Evarts could be aptly conjoined for comparison as to tones and methods of utterance. Four years later, during the Lincoln campaign, Evarts' arraignment of human slavery, not only as to its sin, but its political impolicy, attracted universal popular attention. In that behalf he became the Charles Sumner of the Middle States.

The Lincoln campaign immediately succeeded the occasion of one of his greatest professional triumphs. This came when a Virginian, on his way to Texas by steamer from New York, traveled with eight of his slaves in his keeping. Some philanthropic anti-slavery residents procured a writ of habeas corpus, on the claim that this planter unlawfully deprived these domestic servants of their liberty. The controversy is known at the bar as the Lemmon Case. Charles O'Conor was employed to oppose the writ, and held also a retainer from the State authorities of Virginia. New York's governor also joined in the retainer to Mr. Evarts; and an intricate battle of State rights occurred. Mr. O'Conor's contention was, like that of Mr. Evarts, controlled by his personal views; for Mr. O'Conor was a Calhounist, a strict advocate of the supremacy of State rights over Federal interference, and a sympathizer with the institution of slavery, both ethically, and as a matter of legal policy. Mr. O'Conor boldly argued that his client had not parted with his Virginian status as a lawful slaveholder by journeying into the State of New York, wherein a statute declared that any slave entering it became manumitted, *ipso facto*. This contention, said Mr. Evarts, is absurd, and proves too much. "What," he exclaimed, "can it be that on leaving the protection of one State, its citizen can enter another, not as resident temporarily of it, but remain clothed with all the attributes of his old citizenship? If this principle is to be carried out to a full extent, then the gambler entering New York from a State where his paraphernalia and occupation were legalized, could not forfeit the tools of his illegal occupation under our statutes that confiscated them, because, forsooth, while standing on the soil of New

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York he possessed still a controlling citizenship in that first State."

Free soil triumphed, and the slaves were set free by the Court of Appeals, Democratic Judge Denio joining in the opinion of Republican Judge Wright, and there being no dissent. The argument had been intently watched over North and South. Newspapers discussed the question pro and con, and Southern secessionists claimed the habeas corpus proceedings to be a fresh attack of Northern fanaticism upon Southern property rights.

In the same year which heard the Lemmon slavery argument, Mr. Evarts had been one of the notable oratorical delegates to the Chicago Convention which nominated Abraham Lincoln. He had also, in the next year, been a candidate in the Republican legislative caucus for United States senator, to succeed Mr. Seward, who had resigned to assume a cabinet place under President Lincoln. The legislature was divided into the Horace Greeley and the Thurlow Weed factions. That great editor was the candidate of the one, and Mr. Evarts of the other. I was, being then holder of a political office, one of a private caucus of Mr. Evarts' friends, held on the day before the election. A proposition was made in it that financial reasons could be brought to bear in his favor upon his opponents. I recall the remark of Simeon Draper, who was present : "No use, gentlemen, for if it were done and successful, such are the supremacy of Mr. Evarts' principles, that when he discovered the means he would not accept." And Mr. Evarts himself suggested the compromise of voting upon Judge Ira Harris, as senator, which was accomplished. But as will presently be told, he was destined to become the victorious tortoise in the same species of race a quarter century later.

Again the forum of the Bar, 1862, heard Mr. Evarts' great argument in the Supreme Court at Washington, in what are known as the piracy cases, growing out of circumstances affected by the commencement of the Civil War. When that war was ended he made another renowned argument against the constitutionality of a State taxing Federal bonds — an argument that would have delighted the shades of Webster and Story could they have been permitted to spiritually hear it. It is notable that Mr. Evarts should during his career have been invited so often into the novel and untraveled regions of jurisprudence. He delighted in their exploration, and cared little for following beaten paths of litigation. For instance, he obtained, by ingenious distinctions of cases and differentiations of apparently conflicting statutes, the constitutional formulation of a novel statute of New York State, creating an appointed State police over an amalgamation of its counties, while the Constitution seemed to forbid local officers to be otherwise than elected or named by purely local authority. Here he was opposed by Charles O'Conor, as in the Lemmon case. I was junior with Mr. Evarts in the argument, and never before or since have I listened to such rare illustrations, such subtle distinctions, and such an aggregation of constitutional lore as scintillated in his elaborate and persuasive speech. The Albany court-room was crowded. Before argument began, I polled the consensus of lawyers whom the importance of the litigation between city and State had attracted, and scarcely one believed that our contention would succeed. The presiding judge was an especially strict constructionist of constitutional provisions, yet he wrote the opinion: establishing on the Evarts brief and argument the Metropolitan Police District that for a quarter century protected the city of New York as it had never before, nor ever since, been protected in person and property, and which in 1863 saved it from despoil by an infuriated mob when a military draft was being enforced.

Mr. Evarts is therefore entitled to rank

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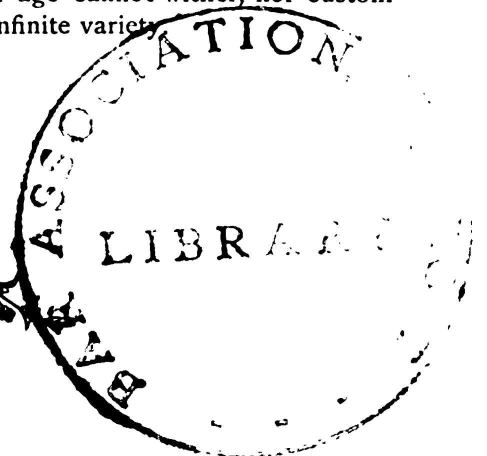
high among such benefactors of his city as were Robert Fulton on the Hudson River, DeWitt Clinton with his Erie Canal project, Mayor Aaron Clark with his Croton water schemes, and that twin publicist and great lawyer, Henry C. Murphy, with his Brooklyn bridge.

Mr. Evarts' great defense of President Andrew Johnson before the High Court of Impeachment is within memory of this generation and readers of the GREEN BAG, and needs no more than a reference. Mr. Evarts' speech therein ranks, in historical, legal and parliamentary importance, beside the renowned addresses on the impeachment trial of Warren Hastings. Beside the report of the latter case — now exactly a century old — in the library of the Benchers of the Middle Temple in London, I saw placed the congressional report of the Andrew Johnson trial: so that they who read in one volume the impassioned oratory of Sheridan, can next turn to the logical strength of the Evarts argument, that unquestionably decided wavering senators, and gave his client a majority of one for acquittal.

Mr. Evarts' career as Attorney-General is also within memory of the Bar and Bench of this generation. His opinions in the collected volumes which contain also opinions by such eminent predecessors as Theophilus Parsons, Pinckney, Wirt, Taney, Butler, Crittenden, Legaré and Cushing will for style, pith and value bear comparison with any. Moreover, this generation need only to be reminded that Mr. Evarts enjoys with Richard Olney the sole distinction of having served both as Attorney-General and Secretary of State. Of the counsel to the claimants and respondents in the international body that in 1872 settled the Alabama claims, Mr. Evarts was *primus inter pares*.

But, as in the case of Daniel Webster, the legal fame, fleeting as this is commonly assumed to be, will even among laymen outlive the political fame of Mr. Evarts. It was the first species of fame that really illustrated and promoted the latter, both for him and Webster. The greatest statesmen of England have not been lawyers, but those of the United States always have come from its Bar.

Mr. Evarts, now approaching the octogenarian era of man's span of life, is in partial blindness and weakness of frame: paying the penalty of a well-spent life, wherein head and heart have never ceased to toil. But both of these organs remain as young in this grand old American as ever. His interest in mundane affairs continues equally vivid. When read to by loving tongues his comments are as vivacious, pungent, philosophical and intrinsically valuable as at any time of life. May he long remain one of those whom age cannot wither, nor custom stale their infinite variety.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THE EXTRADITION OF ARTON.

TWO very important points in the law of extradition were raised before the Queen's Bench division in London at the end of last year. The French authorities demanded the extradition of Arton for certain indictable offenses within the Anglo-French extradition treaty. Sir John Bridge, the chief magistrate, made an order for his surrender, at Bow Street Police Court. Arton appealed to the High Court under the Extradition Act of 1870. Various points were taken on his behalf. But the two with which alone we propose to deal here were, *first* that the demand for extradition was not made in good faith or in the interests of justice, but from ulterior motives; and *secondly*, that while the requisition for Arton's surrender was nominally based on larceny and embezzlement, the real intention of the French government was to press him to disclose certain State secrets with reference to the Panama scandals, and punish him if he refused to reveal them. The Court held that they had no jurisdiction to entertain either of these objections. It need scarcely be said that in the following observations we treat them merely as a hypothetical set of facts for the purpose of a legal argument. It must be frankly confessed that there can be no two opinions as to the imperative necessity that if a *prima facie* case for extradition is made out, the Courts should not in any way concern themselves with the motives of the treaty-power demanding—subject always to the consideration that by Section 3, Subject 1, of the English Extradition Act of 1870, a fugitive criminal is not to be surrendered, "if the offense in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character." Arton's case clearly could not be brought within the first part of this provision, the offense for which his extradition was demanded was not one of a "political character." But could it not be said that, assuming his allegations to be correct, it was intended to "try or punish him for an offense of a political character." The Court answered these questions in the negative for two reasons: first, that the extradition act did not contemplate the case of an offense not yet committed, and secondly, that even if Arton's allegations were true, they did not disclose any "offense of a political character," for which he was to be tried or punished. Suppose that Arton's story was true. He was to be called upon to disclose secrets which he would refuse to reveal. His refusal would be contempt of court. Contempt of court is an "offense." Moreover, if the procedure by way of contempt is put in motion for political objects, the offense is invested with a "political character," and if the extradition is demanded, with the certainty of his punishment for such contempt in contemplation, it *might* be contended that it is demanded "with a view to punish him for an offense of a political character." We admit that this is a strained, and perhaps not legally sound construction of the Act. But assuming such a case as we have dealt with to arise, it would inflict a distinct defeat upon the intention of the Legislature (which was to prevent a foreign government from striking at its political opponents through the extradition procedure) if the requisition for

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surrender could not be refused. It will be observed, however, that the Secretary of State has a voice in the matter as well as the judiciary, and probably the law's extremity would prove to be the diplomatist's opportunity. * * *

LEGAL REMINISCENCES.

By L. E. Chittenden.

XIII.

EUGENE FIELD, THE CHILDREN'S POET.—THE BROTHERS CHARLES K., AND ROSWELL M. FIELD.—THE ACTION OF TORREY *V.* FIELD FOR LIBEL.

HE loved children, and children loved him. So write of Eugene Field those who knew him best, and what man could ask to have said of him a more exquisite thing? I only knew him through his verses. I love to read his verses, for they remind me of something written about another who loved the little ones. "And they brought young children to Him that He should touch them. And He took them up in His arms and put His hands upon them and blessed them."

Thinking of Eugene Field sets the reminiscence machinery in motion. Eugene Field was a Vermonter, born somewhere in the West by accident or mistake. In my boyhood there were two brothers Field in the Green Mountain town of Newfane. One of them, Charles K. by name, became and continued while he lived to be one of my dearest friends. He was a very liberal man, for he always addressed me by my Christian, middle, and surname, with the addition of Esquire. He was the quaintest of mortals — a distinguished member of the Third House, the author of the "Act for the substitution of wooden-side judges for the perishable creatures of flesh and blood now (then) in use," and the able report in its favor. His brother, Roswell M. Field, followed Mr. Greeley's advice, "went West" to St. Louis, invented the Dred Scott case, and became distinguished. This is how his son, Eugene, came to be born *dehors* his native State.

Before Roswell M. Field emigrated, he provided Vermont with her star action for libel. The trial was eight days long, and I fear that I cannot make the history of it much shorter. Field had married Mary Almira, daughter of Doctor Elisha Phelps, of Windsor. He commenced a suit in equity in the name of his wife and himself against Susanna Torrey, the executrix, who also claimed to be the widow of Dr. Phelps, to compel her to account for the estate and property.

Bills in equity under the old practice were always prolix, and this one followed the precedents. It alleged that in 1787, Dr. Phelps was by the Reverend Cyprian Strong duly married to Miss Molly Bartlett, a young, interesting and amiable maiden of Haddam, Conn.; that after a few years Mrs. Molly was attacked by a virulent disease which impaired her eyesight, whereupon the Doctor "went about to employ other female help meet for upholding his domestic establishment, and to that end engaged one Hopy Tolbot of Pocatapaug Flats, to take up her residence with the said Elisha, to minister unto his wants and necessities, as a housekeeper and handmaiden, for her meat, drink, clothing, and comfortable lodging; that she performed her duties undisguisedly, to the great distress of the said Molly, who was "seized with clonic spasms, attended with lachrymose ophthalmy, and a sympathetic hysteria supervened, whereby she became totally

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blind." The Doctor then dismissed Hopy, and engaged one Sukey Eastman, spinster, of Hanover, N.H., a tailoress, now Mistress Susanna Torrey, a defendant, to supply the vacancy in his household, and "to be unto the said Elisha in all things the same as the said Hopy had been, and for the same compensation and no other — that said Sukey entered upon her duties and continued to discharge them until 1819, when the Doctor died, leaving a will in which, after making provision in lieu of dower for his wife Molly, and some specific legacies, he left his estate in equal shares to his six children, one of whom was Mary Almira Field, the complainant.

The bill further stated that the defendant Susanna, with one Lord, were executrix and executor of the will; that she duly qualified, and after payment of the debts and specific legacies there remained in her hands about sixty thousand dollars belonging to the residuary devisees; that by sheer craft and wicked cunning the said Susanna set about cutting off the devisees and absorbing the entire estate; that she assumed the Doctor's name, and began to pretend and give out in speeches that she was his lawful wife and entitled to dower in his estate; that by divers artful pretenses, and much crafty dissimulation she had procured the mansion-house of the testator, convenient to the State prison in Windsor, the lot on Nose Hill, and the Parmalee meadow, three valuable parcels of real estate, to be set off and one-third of the personalty to be assigned to her as her dower; that these proceedings took place while Mary Almira was an infant, were fraudulent, and ought to be set aside.

The bill then charges that the said Susanna threatens to "make war upon the complainants," — to "blacken their characters and exclude them from society," if they call her to account; that she employs subterfuges and threadbare shifts; sometimes she pretends that she was the testator's lawful wife, and because he had one wife living, she pretends that he was compelled to marry Molly Bartlett by violence and actual force. and so his was no lawful marriage; at other times that while the said Elisha and Hopy Tolbot were at school together in Huggamum Hollow they began to take pleasure in each other and formed a matrimonial engagement of which there were many confirmations, and the marriage of said Elisha to Molly Bartlett was in open violation and plain derogation of such solemn engagement and pre-contract with Hopy Talbot of Pocatapaug Flats, and was a nullity; sometimes she claims that that marriage was void because there was no publication of the banns and it was without the knowledge or consent of said Elisha's mother, then residing in Green Woods, forty miles from Chatham, and because it was agreed that it was to be no marriage unless the said Elisha should afterwards elect to call it one, which he never did. And sometimes she pretends that a divorce was granted to the said Molly on her own petition for the adultery of the said Elisha with the said Susanna and other women, whereas the complainants charge and the said Susanna well knows, if there was any such divorce, that when the said Molly was afflicted with fits, wholly blind, and unable to read or write, the said Elisha by the procurement of said Susanna went with the petition to said Molly when she was sick and lonely and away from her friends, and threatened if she did not sign it he would forever abandon her and go without the State and dwell with a harlot in remote places, and there indulge in bigamy, adultery and all manner of sinful pleasures; that he had consulted an attorney of great eminence and skill in cases of prostitution, and had been advised that he might cohabit with whomsoever he would with impunity, and said Elisha, unmoved by the tears of said Molly, and led by evil passions, artfully excited by said Susanna, also threatened to sell his property and go with his harlot be-

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yond seas, leaving said Molly without home or shelter to wander a blind beggar in the earth, when if she would sign said Elisha would convey to her the garden-spot, house and furniture at Chatham, where she might dwell in peace and solitude; that if said Molly did sign such petition she did it in anguish and distress of mind, influenced by the artful persuasions, menaces, and threats, and under the duress of her husband, and that she never gave any consent to the prosecution of said petition, nor to said pretended divorce, and if any such was obtained it was by menaces, covin, collusion, fraud, deception and circumvention, and ought to be holden in law and equity null and void, utterly frustrate and of none effect.

The bill charges many other acts of wickedness on the part of said Susanna; that she has got possession of the ancient family Bible, and many other valuable books, papers, and documents, and refuses the complainants access to them; that she has employed aged attorneys and others to go about prejudicing the public against the plaintiffs and exciting pity and compassion for herself.

The bill prays that the assignment of dower be set aside; the said Susanna be decreed to hold the estate as trustee for the residuary devisees, and to account for rents and profits; that the said Mary Almira be let into the possession of one-sixth part of the estate; and for such other relief as she was entitled to in equity.

One of the devisees, who declined to join as a plaintiff, was made a defendant, and resided without the State of Vermont. The bill was presented to the Chancellor with the draft of an order of notice to that party by publication. In conformity with the practice the Chancellor signed the order without reading the bill. The entire bill, from its title to the certificate of verification was thereupon printed and published in the local newspaper.

The former Miss Eastman, after the death of Doctor Phelps, had married, and now bore the name of Torrey. She brought an action against Mr. Field for the publication of a libel upon her character, claiming ten thousand dollars damages. Mr. Field answered her declaration by ten special pleas, which asserted that the statements of the bill were true, that after reasonable inquiry he believed them to be true, the pendency of the action in Chancery and the Chancellor's order of publication. Six of these were held back on demurrer. To the four that were held good the plaintiff replied *de injuria* (for an explanation whereof see Moss *v.* Hindes in these reminiscences). These pleadings admitted the publication and gave the defendant the closing argument to the jury.

The trial at Woodstock occupied from the 17th to the 24th of May, 1834. Although assisted by eminent counsel, the report shows that Field thoroughly refuted the old saw about a lawyer trying his own case. At all events he made the trial a hot one for Sukey Eastman Torrey. Nearly a half century had passed, and he failed in his proof of the contract with Hopy Tolbot of Pocatapaug Flats. As to this the jury must have thought with Maud Muller that

> "Of all sad words of tongue or pen,
> The saddest are these, 'It might have been!'"

He satisfied the moral convictions of the jury, although after forty-five years he could not prove the contract by legal evidence.

The proof seemed to justify the other averments of the bill. The principal of these was the fraudulent divorce. Around this the others clustered. The amiable character and patient suffering of the blind, deserted wife, the bribes and brutal threats by which, at the instigation of the plaintiff, the Doctor compelled his suffering wife to sign the petition prepared by his own lawyer, charging him with criminality with the woman he wished to put in his true wife's place, the exhibition to witnesses of acts to justify a divorce, the prosecution of the petition to the

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final decree, drawn by the Doctor's lawyer at his own expense, and his neglect to provide for his wife as he had agreed, with many other facts touching the plaintiff's character, were very satisfactorily proved.

Judge Collamer presided at the trial. When he held the scales of Justice nothing but strict legal evidence could be placed in them. Prejudice, passion, sympathy, pathos, all went for naught. He told the jury that the alleged libel implied if it did not directly charge acts of adultery upon the plaintiff with Dr. Phelps, before the decree of divorce, and unless the defendant had proved that charge by evidence which would support a conviction upon an indictment for the crime, and so forcible as to leave no reasonable doubt on the minds of the jury, their verdict must be for the plaintiff. He said that the idea that a strict proof could be dispensed with because the charges related to an ancient transaction could not be admitted for a moment.

On another point the justification was also difficult. The plaintiff proved by evidence not controverted, that the usual practice among solicitors was to execute an order of publication by publishing a concise abridgment of the stating part of the bill only. The Judge therefore instructed the jury that if they found that the publication here contained more than such substance under such practice, and that the excess was libellous, they would hold the defendant responsible. Under such instructions, without disregarding them, the jury could not have found a verdict for the defendant. Such disregard was reserved for later times — it was never encountered by Collamer or judges of his type.

On the question of damages the charge was sound and instructive. The jury were told that the pleas alleging the truth of the charges was a circumstance generally tending to enhance the damages, but if the defendant believed them to be true, he should not on that account be visited with vindictive damages. The jury would consider the manner and extent of the publication, the nature of the charges, the causes of the defendant's irritation, and give damages apportioned to the plaintiff's present character without reference to to her youthful aberrations. Finally, he admonished them to give the plaintiff an amount of damages which would repair the injury to her character, but not so large as to encourage actions for libel — in short they should render a wholesome verdict, just between the parties, and salutary in its influence upon society.

It would not have been extraordinary if the jury had found some difficulty in reaching a conclusion which would cover all the points to which Judge Collamer directed their attention. But they promptly agreed. The secrets of the jury-room are inviolate, but we may infer that the jury considered that the defendant had endured the affliction of a mother-in-law whose resources for irritation were exasperating. He had not always restricted his observations upon her conduct within lawful limits — he would have been superhuman if he had. After the plaintiff had borne for a fourth of a century the natural shocks which her unequivocal relations with the deceased doctor must have produced in a staid New England community, the bloom of her youthful innocence must have been so worn away that the surviving remnant of her character could not have been very much damaged by the charge that she was the Doctor's mistress. On the whole case, the twelve came to the conclusion that the instructions of the court would be obeyed, the symmetry of the law preserved, the defendant properly punished, the rent in the plaintiff's character mended as well as it could be, and a wholesome influence exerted upon the public mind by requiring the defendant to pay to the plaintiff one dollar in any kind of sound money. The only point on which debate may have arisen, was whether the amount should be one dollar or one cent. On this

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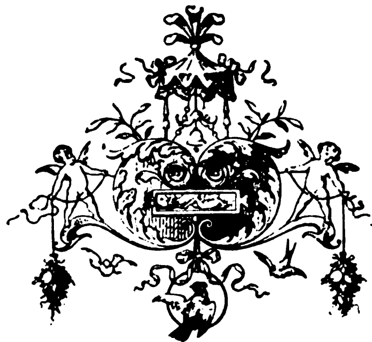
question, if the jury were evenly divided, one of the advocates for the larger sum may have proposed to deal with it as Mr. Webster once (after dinner) did with the national debt, when he said that, sooner than have any debate about it, *he would pay it himself!* At all events the jury agreed upon a verdict for the plaintiff for one dollar, and the court having adjourned for the day, sealed it up, placed it in the breast-pocket of their foreman, and went home to their suppers and their beds with a serene consciousness of justice done and public duty well performed. This verdict carried with it another dollar of the plaintiff's costs.

Under the rules of court at that time in force, either party might have once reviewed the judgment; in other words, have had a new trial by asking for it. As there is no record of any further proceedings in the action for the libel, it is to be inferred that Mr. Field was of the opinion that the trial had given him two dollars' worth of entertainment, and if the plaintiff was satisfied with the verdict he ought to be content; and if outsiders asked which party won, the words of "Old Caspar," when asked a similar question about the battle of Blenheim, would be in point: —

> "Why that I cannot tell, said he,
> But 'twas a famous victory!"

The ingenuity disclosed in the ten special pleas; the opinion of the Supreme Court, holding six of them bad on demurrer, and the divorce proceedings dissolving the marriage of Field and Miss Phelps, because the ceremony was not followed by cohabitation, are all necessary to a full history of this singular litigation. They may be considered in a subsequent article.



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SOME NOTES ON QUIBBLING.

By George H. Westley.

THE quibble is as ancient as Eden. Our first parents quibbled, and we have been quibbling ever since. When God said, "Hast thou eaten of the tree?" did he receive an unequivocal reply? Nay, Adam shuffled over the matter, saying, "The woman whom thou gavest to be with me, she gave me of the tree." Mother Eve likewise avoided the affirmative monosyllable, pleading, "The serpent beguiled me." This is rather a weak specimen of the quibble, perhaps — most things are weak at birth — but in view of the inherent tendency of our nature to evade, to shuffle, to equivocate, when we find ourselves in a tight place, it may reasonably be looked upon as the genesis of quibbling.

Quibbling then dates back to man's first disobedience, and does not owe its origin, as someone has hinted, to the codification of laws and the advent of the lawyer. The equivoke is a weapon of common possession, but the skill to use it to the best advantage must be acquired, even as the master of fence acquires his marvelous dexterity. The old poet realized this:—

> "O many are the lawyers that are sown
> By nature; men endowed with nicest quirks,
> The quibble and the fallacy refined;
> But wanting the accomplishment of slang,
> Which in the docile season of their youth
> It was denied them to acquire, through lack
> Of lectures, or the inspiring food of inns;
> Nor having e'er, as life advanced, been led
> By circumstance to take unto the height
> The measure of themselves for wig and gown,
> They go to the grave unheard of."

In ancient times the quibble was actively employed, and many a man fell a victim to the clever word-twisting of his tricky opponent. In these matter-of-fact days we have grown more wary, and are seldom caught. The few recent examples of successful quibbling which occur to me at this moment, are of such a commonplace character that I will not describe them, but will pass on to older and more interesting cases. Before leaving the present, however, let me say that the plea of "Not Guilty," so often heard in our courts, would seem to possess something of the nature of a quibble. An old law-book says, "A man who has committed an offense may plead 'not guilty,' and yet tell no lie; for by the law no man is bound to accuse himself — so when I say I am not guilty, the meaning is as if I should say, 'I am not as guilty as to tell you. If you bring me to trial, and have me punished for what you lay to my charge, prove it against me.'" Here we have a sort of legalized lie; an untruth as far as the hearer is concerned, but no falsehood to the speaker because of a mental reservation. Let casuists decide.

An amusing instance of quibbling is to be found in the following story related by a verdant son of Ireland: "Sure, and I'm heir to a splendid estate under my father's will," said he; "when he died he ordered my brother to divide the house with me, and by St. Patrick, he did it — for he tuck the inside himself and give me the outside."

In "State Trials," by Nicholas Moile, we find the following "Action on the case for words. Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head; the one part lay on the one shoulder, and another part on the other. The defendant pleaded not guilty, and it was found against him. It was now moved, in arrest of judgment, that these words were not actionable, for it is not averred that the cook was killed, but argumentative. The court was of that opinion, Fleming C. J. and Williams absentibus; for slander ought to be direct, against which there may not be any intend-

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ment, but here, notwithstanding such wounding, the party may yet be living, and it is then but trespass. Wherefore it was adjudged for the defendant." Sir Thomas's attack upon his cook reminds one of the smiting of Pandarus by Turnus:—

> Scalp, face, and shoulders the keen steel divides,
> And the shared visage hangs on equal sides.

If Virgil had had the true legal instinct, he surely would have added that the wound was fatal.

A man once said of an attorney, that he had "no more law than Mr. Crocker's bull." For this he was brought to court, whereupon he endeavored to escape by saying that Mr. Crocker had no bull. But the quibble did not work. "If that be so," said the judge who tried the case, "then the scandal is the greater."

That reminds me of the schoolboy—evidently one of the lawyers sown by nature—who, having been convicted of some offense and sentenced to the usual punishment, requested as a favor that its execution be postponed until he had got his evening meal of bread and milk. This indulgence being formally granted, the youngster declared that he did not mean to eat any bread and milk that evening, and contended that consequently the promise made to him amounted to a reprieve *sine die*. The lad deserved to escape for his cleverness, but it is recorded that old Dryasdust only walloped him the harder.

In the matter of slander the quibble has frequently been employed with successful results. For instance, A said of B that he had "as much sense as a pig." That A meant to be abusive was plain, but he wormed himself out of any unpleasant consequences by arguing that to say B had as much sense as a pig, was by no means to say that he did not have a great deal more. Again, C publicly remarked of D that he "deserved to be hanged as much as ever Blank did at Newgate." This was not actionable, as it was a mere expression of opinion, and D could not prove that C did not believe that Blank never deserved hanging.

Here is a peculiar hypothetical case which I picked up in an old volume: Brown and Smith are witnesses on a case. Brown says to Smith, "One of us is perjured!" Smith replies, "It is not I." Brown says, "I'm sure it is not I." Smith shall then have cause for action for these words, for in the brief colloquy, Brown has called him a perjurer, just as surely as if he had said, "Smith, you are a perjurer!"

Sir William Fish once attempted to escape an obligation by a quibble. He had been ordered by court to pay "fifty pounds" on a certain day at Gray's Inn. Promptly at the appointed time he appeared, and tendered fifty pounds weight of stone. Sir William's ruse had all the success it deserved.

An ancient case of court quibbling is the following, recorded by Herodotus. It appears that Archetimus of Erythræa, having made a journey to Tenedos, and availed himself of the hospitality of Cydias, handed over to his host a sum of money for safe keeping. When Cydias was asked to return this money, he refused to do so, and the pair went to law. Finally the whole matter hung upon Cydias' oath. Now the latter was too much of a knave to confess the truth, and too much of a coward to tell a bold lie, so he devised the plan of concealing the money in the hollow of a walking-stick which he put into Archetimus' hands. Having done this he swore that, although he had received the money in question, he had afterwards given it back. This would have been sufficient for his release, had not a peculiar thing happened. Archetimus in a rage threw down the stick with such violence that it broke, disclosing the treasure and discovering the trick. Herodotus imputes the discovery to Divine Providence, and adds that Cydias ultimately came to an unhappy end.

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Perhaps the most famous quibble in history was that perpetrated by Queen Dido. She bargained for as much land as could be covered by a hide, and then cleverly cut the hide into long strips so as to enclose quite an extensive tract. For this feat her memory has been perpetuated in our dictionaries.

But of all the quibblers of old, commend us to the men at arms. When Temures beseiged Sebastia, he promised that if they would surrender, no blood would be shed. The garrison took him at his word and surrendered, when Temures, quibbling upon his promise, buried them all alive.

Aryandes, treating with the Barcoeans, enticed their ambassadors to a place prepared for the purpose, where he swore to observe the treaty as long as the earth on which they stood should continue firm. He had placed them on a pit having a trap-door covered with earth, which presently he caused to sink beneath him. Having thus, as he conceived, terminated the treaty, he put his unfortunate victims to the sword.

Labeo, the Roman general, having overcome Antiochus, stipulated as a condition of peace, that he should be entitled to carry away one-half of Antiochus' ships. This having been agreed to, Labeo cut each of the ships in two, and carrying off his half destroyed the king's entire navy.

Cleomenes the Spartan, having entered into an armistice with the Argive army for seven days, fell upon them during the third night, and killed and captured a great number of them while they were fast asleep. On being reproached with his perfidy, he argued in justification that he had made the truce for seven days, but had said nothing about the nights.

A Roman officer, taken prisoner by Hannibal, was permitted to leave camp on a promise that he would speedily return. Just after leaving, he returned on pretense of having forgotten something, and again went away. He then hastened to Rome, where he remained, maintaining that he had kept his promise to speedily return, and therefore would not go back.

Coming down to more modern times, it is told that a distinguished Spanish general, having bound himself by oath never to fight against the French army, whether on foot or on horseback, took the field against them at the battle of Rocroy in a sedan chair.

Equivocatory clauses in wills, and puzzling inscriptions on burial stones and statues have frequently formed the groundwork of very interesting stories. Petrarch tells us one to this effect: There was in Sicily a huge statue on which this inscription was engraved in very ancient letters, "On May-day I shall wear a golden head." Many persons considered this statement as a jest, while others went to the length of piercing the head on the day mentioned, hoping to find it really golden. Finally one man, more expert in quibbles than the rest, came on May-day to the spot, and observing where the first rays of the sun threw the shadow of the head of the statue on the ground, he dug there, and laid bare an immense treasure of gold.

Shakespeare's quibbling in Macbeth is notorious. "None born of a woman shall harm Macbeth." Rather a weak quibble, William, to claim that a child brought into the world by the Cæsarean operation was not born of his mother. "Till Birnam wood shall come to Dunsinane" is not much better. No wonder Macbeth should exclaim :—

> "And be these juggling fiends no more believed,
> That palter with us in a double sense;
> That keep the word of promise to our ear,
> And break it to our hope."

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THE ANGLO-GERMAN CONTROVERSY IN THE TRANSVAAL.

IT may be convenient at the present time to consider the Anglo-German controversy in the Transvaal from the standpoint of international law. The political facts involved in it are of too recent and familiar a character to require anything more than the briefest recapitulation. The idea of South African confederation, subject to the golden link of the British Crown, had laid a strong hold on the imagination of the Earl of Carnarvon, who was the British Colonial Secretary of State in the Conservative government of 1874. In 1877 Sir Bartle Frere went out to the Cape as governor, with the fixed intention of realizing it if he could. The Transvaal, the home of the Boers or Dutch settlers, who had gradually been "trekking" northwards from the South before the ever widening range of the sphere of British influence, was annexed by Sir Theophilus Shepstone on April 12, 1877. The situation was a peculiar one. The Boers had recently been defeated by the Zulus. Their army was disorganized. Their treasury was practically empty, and Shepstone, who was the English agent in the matter, concluded that they were in favor of annexation, and took the step above referred to almost before Sir Bartle Frere had got fairly to work as governor. The Boer leader of the day, President Burgers, sent the now famous President Kruger and his colleague, Jorissen, to London to rouse public, and especially Liberal opinion against the annexation. They were not, however, particularly successful at the moment, and returned to the Transvaal during 1877 or 1878. The English, whatever may be thought of the morality or policy of the original annexation, undoubtedly did good service to the Boers in protecting them against Zulu or Kaffir attacks and ravages. But they did not become reconciled to English rule; and in the spring of 1879 the great Boer camp was formed near Pretoria and a memorial prayer that the annexation might be undone was forwarded to England. It was rejected by the Conservative government, much to the dissatisfaction of the Liberal opposition of the day. Mr. Gladstone was especially strong in his denunciations. He described the annexation of the Transvaal as the invasion of a free country; and on another occasion, referring to the Transvaal and Cyprus (of which England acquired possession under the Kars-Batoum arrangement): "If these acquisitions were as valuable as they are valueless, I would repudiate them because they are obtained by means dishonorable to the character of the country."

The general election of 1880 put Mr. Gladstone in power with a large majority. In June, 1880, he intimated to Kruger and Joubert that the Queen could not be advised to relinquish her sovereignity over the Transvaal. On Dec. 16, in the same year, Kruger issued a proclamation declaring the Republic re-established. The British troops who were despatched against them were defeated at Brownker's Sprint and Majuba Hill, and Mr. Gladstone's government concluded the convention of 1881, by which the internal independence of the Transvaal and the suzerainty of Queen Victoria over it were at once and explicitly recognized. This convention was however, amended in 1884 by another convention, in which there was no reference to the Queen's suzerainty, but which contained a provision that the South African Republic should conclude no treaty with any foreign power other than the Orange Free State, without Her Majesty's sanction and approval. The question at

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issue between England and Germany is this: In what position does this convention leave the former "suzerainty" of England over the Transvaal? The official German contention is, it is clearly abrogated, and that the Transvaal is at liberty to "steer her course" — to use classic language — among the nations of the world as an independent state, subject to the single limitation as to treaty making. President Kruger is stated to have recently declared to one of the ubiquitous interviewers through whom so much of our information as to public men is derived, that if he had thought that the convention of 1884 meant anything less than this he would never have signed. On the other hand, English ministers of both parties have consistently interpreted it in a very different sense, so that the argument from intention does not carry us very far. The official English view may be stated thus: The convention of 1884 amends, *but does not abrogate*, the convention of 1881; there was, therefore, no necessity to repeat the provisions in that convention affirming the Queen's suzerainty, and they remain in full force; the only independence that the Transvaal enjoys is as to her internal concerns; England has an absolute and exclusive control over all her foreign relations. The convention of 1884 is, it must be admitted, by no means so clear as might be desired. But the English case is distinctly arguable, and there can be little doubt as to the determination of the country that it shall be maintained. Some curious questions of construction might be raised incidentally in connection with this controversy: suppose that the German view is correct, and that the suzerainty of England over the Transvaal is now set aside. What is the scope of the prohibition of treaty-making? Does it apply merely to formal treaties or arrangements, or would it strike at any "understandings" or relations of any kind between the South Africa Republic and a foreign power? It would be very difficult indeed, we should think, to maintain that it did. As a piece of draughtsmanship the convention of 1884 is not a document of which we have much reason to be proud. And we have to thank it also for a serious and troublesome international complication. The only other point to which we need refer is the question as to the effect of Dr. Jameson's raid on the Transvaal upon the convention's obligatory character. It is *ex concessis* that the Imperial Government, the British high commissioner at Cape Town, and the directors in London of the chartered corporation of South Africa did everything in their power to stop Jameson's progress, and practically outlawed him and his devoted band. It is also too clear to be disputed that, in spite of this prompt disavowal, the Imperial Government is liable to indemnify, at the expense of its agent, the chartered corporation, if it chooses, the Transvaal authorities for the losses that the Jameson expedition may have caused them. But the intention of the Imperial Government to maintain the treaty having admittedly never wavered, and every possible step to secure its observance having been taken, it is conceived that England is still entitled to the benefit of the convention of 1884, whatever it may be worth to her.

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THE SUPREME COURT OF MAINE.

VI.

By Charles Hamlin.

CHARLES DANFORTH, an associate justice of the Supreme Judicial Court of Maine for twenty-six years, was a native of Norridgewock, Somerset County, Maine, where he was born August 1, 1815. His father, Israel Danforth, a farmer and saddler by occupation, was a native of Washington, N. H., and settled in Maine about 1805. The family is of English origin. Some of his ancestors came to Maine prior to 1700. One of them, Thomas Danforth, was an associate justice of the Superior Court under the charter of 1691, as has been stated in the GREEN BAG, Vol. VII, p. 460. Charles's mother's name was Sally Wait. She was a native of Groton, Mass., and removed to Maine about the same time as her husband.

Judge Danforth's early education was obtained in the district and private schools of Norridgewock, and was supplemented by a course of study in the academies at Farmington and Bloomfield. After leaving the academy, young Danforth began the study of law in the office of John S. Tenney, who was then in practice at Norridgewock. How deeply Judge Danforth was indebted to Judge Tenney and how sincerely appreciative he was of the benefits of this early association is amply testified in his eulogy upon Chief-Justice Tenney quoted in the sketch of the latter in the GREEN BAG, Vol. VII, p. 508. Mr. Danforth was admitted to the Bar in Somerset County, at the summer term of 1838, and began practice in the town of Gorham in September of the same year. There he remained until October, 1841. In November, 1841, he removed to Gardiner and opened an office in company with Noah Woods, under the firm name of Danforth and Woods, that lasted until 1854, when Mr. Woods retired from the practice of law. Mr. Danforth continued his professional pursuits alone until January, 1864, his cases being such as were tried and argued in the State courts.

Judge Danforth represented the city of Gardiner as a member of the House, in the Legislature, during the sessions of 1850, 1851 and 1852, serving upon the committees on the Judiciary and Insane Hospital, being chairman of the latter committee. In 1855 he was a member of Gov. Anson P. Morrill's council, and in 1857 was again returned to the House of Representatives. He was then twice elected county attorney, and continued to serve in that capacity until his appointment to the Bench of the Supreme Judicial Court, January 5, 1864. During his term as county attorney many criminal cases were tried, but none of a capital character. He displayed in his practice at the bar a good degree of legal erudition, logical force and sound reasoning. His arguments were rather of the conversational style, and he never talked over the heads of the jury. He practiced on the rule that success in the trial of cases depends more on preparation in the lawyer's office than any display of oratory in the court-room; hence his cases were always fully prepared. His reputation for honorable and fair practice flowed naturally and easily from his pure character; and I doubt if he knew how to avail himself of any of the meretricious arts sometimes required to prop a weak case. Not that he lacked ingenuity and tact; for he had that invaluable insight, said to be worth a life's experience, which carried him to the strong and salient points in a case, thus drawing attention away from any unguarded angle of his legal fortress. For his silent skill I should call him the Von Moltke rather than

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the Choate of the Kennebec Bar. Strong, and not brilliant and showy qualities, gave him a good standing among the able lawyers of that Bar, so that on the resignation of Judge Rice, it turned with unanimity to Judge Danforth as his successor. Its recommendation was well received by the State, and Gov. Cony made the appointment accordingly. This appointment was thrice repeated in recognition of the unbounded confidence had in him as a man as well as the satisfactory discharge of his duties as a judge. It is not too much to say that the "love and affection of the whole community went out to him" as long as he was on the bench. His ideal, both at the bar and on the bench, was to be as just as Daniel or Moses, for he believed that the law had its birth in Holy Writ, and he administered it as the judges in Israel, with uncompromising impartiality and signal justice.

During his long and useful career on the Maine bench he had for associates, Chief-Justices Appleton and Peters; Associate-Justices Cutting, Kent, Walton, Davis, Dickerson, Barrows, Tapley, Virgin, Libbey, Symonds, Emery, Foster and Haskell.

My knowledge of his nisi prius work is only that of an observer; but I soon discovered that he had the felicity of an incomparable temper, and that without an enemy in the world his sweetness and kindness won friends always and everywhere. So I was not surprised after the long trial, at which he presided, in Eaton *v.* E. and N. A. Ry., 59 Maine, p. 520, to hear the late James W. Emery of Portsmouth, N. H., an able lawyer of large experience, say that "in his manner of conducting a trial he reminded him more of Judge Benjamin R. Curtis than any other judge he had ever met." The same impression made upon another friend is expressed in these words: "There is always a clear, wholesome judicial atmosphere about him." Besides good judicial judgment, for he was not often overruled, he had good common sense. The absence of metaphysical subtleties and curious refinements in his written opinions make his style commonplace: but commonplace, when used with cleverness and aptness, is always the most telling and useful thing in a judicial opinion. His homogeneous pages are like the air we breathe. There is little color, little variety, but there is an interior harmony and fitness which we find there like a constant quantity in an algebraic formula.

Judge Danforth's daily motto was that of Goethe, "Without haste and without rest." While not noticeable for vivacity, he had an admirable singleness and continuity. His seriousness never permitted him to indulge in wit or humor, yet with his simplicity he fulfilled his purpose with a completeness that satisfies.

His formal, published opinions are three hundred and thirty-five in number. They average nearly seventeen per annum, and embracing all the topics that arise in common law courts. Upwards of thirty of them have passed into the list of oft-cited cases, — a good test of his judicial powers and their value as precedents. Their range is remarkable. I append a list of them. Frost *v.* Ilsey, 55 Maine, 376 (removal of cases); Rankin *v.* Goddard, ib. 389 (foreign judgments); Cratty *v.* Bangor, 57 Maine, 423 (Sunday law); State *v.* Lawrence, ib. 574 (homicide, insanity); Green *v.* Lunt, 58 Maine, 518 (tax title sustained); Holbrook *v.* Connor, 60 Maine, 578 (false representations of cost of land); Harmon *v.* Harmon, 61 Maine, 227 (when threats of criminal prosecution do not constitute duress); State *v.* Reed, 62 Maine, 135 (exceptions); Bartlett *v.* Tel. Co., ib. 209 (void regulations); Holden *v.* Robinson Mfg. Co., 65 Maine, 215 (what are floatable streams, and rights of the public to use improvements made on water courses); Snow *v.* R. R., ib. 230 (evidence, damages); Rumsey *v.* Berry, ib. 570 (dealing in futures); Lowell *v.* Newport, 66 Maine, 83 (pauper); Seed *v.* Lord,

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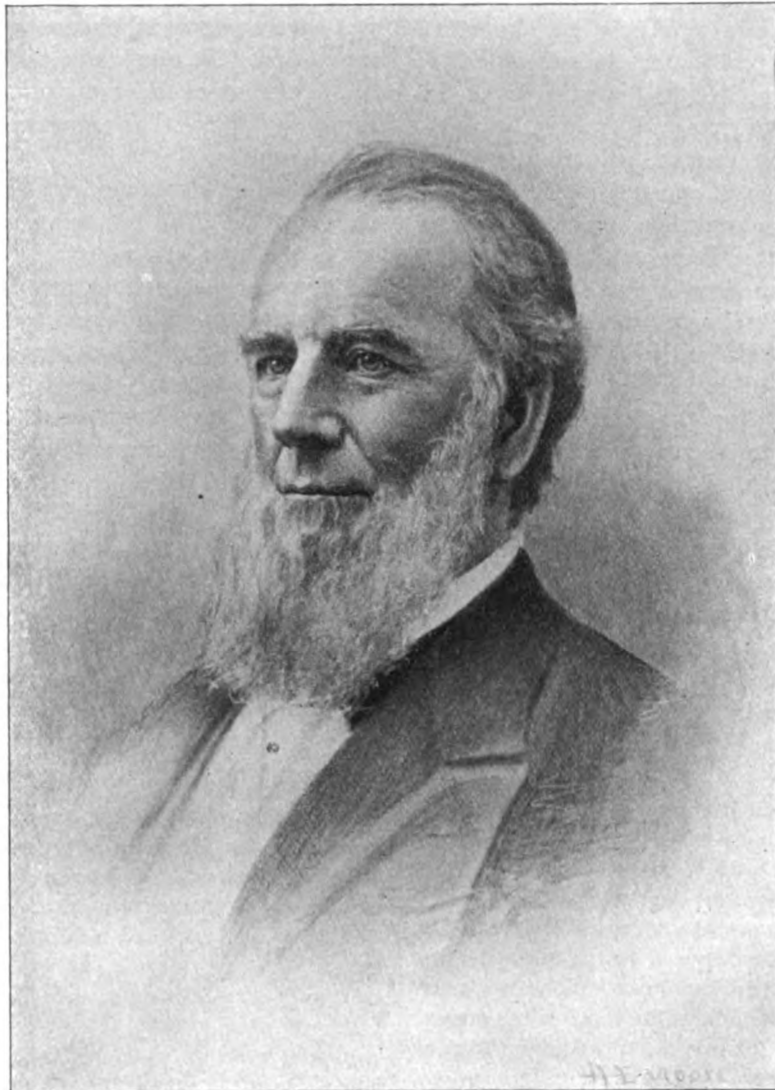

CHARLES DANFORTH.

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ib. 580 (sales); Rockland Water Co. *v.* Tillson, 69 Maine, 262 (easements, damages); Weymouth *v.* Log Driving Co., 71 Maine, 29 (charter, negligence); State *v.* Tel. Co., 73 Maine, 518 (taxes); Stratton *v.* R. R., 74 Maine, 422 (trustees' liability for fires); Rhoda *v.* Annis, 75 Maine, 22 (fraudulent representations in sale of land); Barker *v.* Frye, ib. 31 (savings bank deposits, trusts and gifts); Veazie *v.* Forsaith, 76 Maine, 172 (trusts, principal and income); Bank *v.* Copeland, 77 Maine, 263 (exonerating treasurer Barron of the Dexter Savings Bank); Virgie *v.* Stetson, ib. 520 (levy, joinder in deed by wife); Stevens *v.* Kelley, 78 Maine, 445 (waters, ice); State *v.* Lashus, 79 Maine, 504 (intoxicating liquors); Stillwell *v.* Foster, 80 Maine, 343 (easements); Shaw, applt., 81 Maine, 222 (sustaining a provision for continuance of firm after death of partner); Guthrie *v.* R. R., ib. 578 (negligence).

Judge Danforth wrote the majority opinion in State *v.* Harriman, 75 Maine, 563, which holds that, under our statute against cruelty to animals, the dog is not a "domestic animal." This case attracted wide attention because of the vigorous dissenting opinion by Chief-Justice Appleton, a portion of which is as follows:—

". . . He is a domestic animal. From the time of the pyramids to the present day, from the frozen pole to the torrid zone, wherever man has been there has been his dog. Cuvier has asserted that the dog was perhaps necessary for the establishment of civil society and that a little reflection will convince us that barbarous nations owe much of their civilization above the brute to the possession of the dog. He is the friend and companion of his master — accompanying him in his walks, his servant, aiding him in his hunting, the playmate of his children — an inmate of his house, protecting it against all assailants. Olway, the poet, says of them,

'They are honest creatures
And ne'er betray their masters, never fawn
On any they love not.'"

Judge Danforth was prepossessing in his personal appearance, having a fine form of commanding stature. He was nearly six feet tall, erect and of easy manners and address. His complexion carried the color that belongs to a full glow of health, lightened with a full and "clear germander" eye that gave a perpetual charm to his benignant expression. No one familiar with him would fail in this connection to remember his favorite saying: "The unspoken word never does harm."

He died at his home, in Gardiner, March 30, 1890. At the following session of the law court, held at Augusta in May, memorial exercises were held, reported in full in the eighty-second volume of the Maine Reports, page 582. These exercises, opened by the introductory remarks of the senior member of the Kennebec Bar, Hon. J. W. Bradbury, were followed by touching tributes of Hon. Herbert M. Heath, Judge Titcomb and Hon. Orville D. Baker, and closed on the part of the court by his lifelong friend, Chief-Justice Peters.

Perhaps no more fitting tribute to Judge Danforth can be given than the eulogy of Atty.-Genl. Baker, to whom Judge Danforth was known not only professionally but in all the varied relations of family friend and lifelong neighbor. He said in part: —

"Judge Danforth was a simple man, no man ever more so. He dwelt with substance and had no care for show. In bearing, in character, in life, he was unaffected and true. His dress, his speech, all his tastes and pleasures were quiet and modest. Simple himself, he loved most things that were simple, nature and his God, and he lived ever close to both.

"Long walks in the woods and by the streams, long looks at the mountains and sky brought him deep refreshment which others vainly seek from cards and wine. . . . He was a just man. No man ever followed more implicitly the line of duty, yet no defeated suitor ever felt that his defeat was due to the bias of the judge, and no criminal but knew that the judge who sentenced him would rather have set him free, if justice permitted it.

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"As a presiding judge he was patient, considerate, conscientious, never leaping at conclusions, never in a hurry for results, treating all with unvarying courtesy. I think none ever saw him ruffled in court or moved from his quiet dignity.

"Yet after a quarter of a century of service, the powers and limitations of his intellect could not fail to impress themselves upon the Bar. He was solid rather than brilliant, slow rather than rapid. He relied less upon intuition than industry, and perhaps from that very fact was the safer in his conclusions. He was a tireless and conscientious worker, and when he had fully studied out his subject, he had a strong and comprehensive grasp of legal principles.

"He built up his opinions with great blocks hewn from the common law. He loved equity and hated injustice. He was not fond of being turned aside from the merits by any technicality, and the astutest pleader found it hard to stay him from what he believed to be the right of the case.

"Above all he was a gentle man. I do not know that any heard him speak harshly, and I am certain that no man could ever speak harshly to to him.

"Even his learning, of which he had accumulated much, sat softly on him, and in all his living gentleness became him like a flower. . . . He left life gently, even as he lived it. He was pure in heart, and he shall see God forever and forever."

As a jurist, the analysis of his characteristic qualities seemed fittingly to fall upon Chief-Justice Peters, who, in behalf of the Court, said of Judge Danforth what may also suitably be inscribed here: —

"His intellectual abilities were of a very superior order, and he possessed attainments equal to any judicial task ever devolving upon him. His chief mental power was sound judgment, practical sense, — a faculty without which no judicial career can be successful, but with which, though his principal intellectual endowment, its possessor may attain highest fame. There are all grades of judgment, as of other mental qualities, we all know. It may amount to genius — in some an instinct — in others well nigh a blank. It has been compared to a clock or watch, where the most ordinary machine is sufficient to tell the hours, but the most elaborate alone can point out the minutes and seconds and distinguish the smallest differences of time.

"Judge Danforth possessed the faculty of judgment in a rare degree. His was a sagacious, practical conception, — a strong and an instinctive judicial sense, — such as is not easily acquired unless in some degree naturally possessed, nor acquired more by a study of the written law of the books than by an understanding of the unwritten law of the human heart, — a knowledge of the world. His judgment, never eccentric or capricious on any question, was his great working forge, which never tired out in its steady, even and constant operation.

"He was a very helpful associate in judicial consultations. His temperament and thoughtfulness and appreciation of questions as they were argued were important aids. He never allowed first impressions or first expressions to hold him to indefensible positions; never being so wedded to his own opinions as to love them better than he loved the truth. Not that he was deficient in will or courage, for there was ample development of both in his character. He exhibited great firmness and undaunted courage in maintaining what he believed to be right; while never acting rashly. His convictions ruled his conduct, the will following rather than leading the conviction. Such a man often possesses an unusual degree of what may be called reserve power, a power only occasionally called into action, — power behind power, — the waters that linger in the eddy until some condition arises to sweep them into the general stream. He possessed such power. . . . "

It is a priceless jewel to have enjoyed the friendship of such a man as Charles Danforth, and there is sweet pleasure in gathering up his record to the end that his memory

> . . . "will live alone
> In all our hearts, as mournful light
> That broods above the fallen sun,
> And dwells in heaven half the night."

William Wirt Virgin was associate justice of the Supreme Judicial Court of Maine from 1872 till 1892, thus completing a score of years full of honors and judicial distinction. Born on the eighteenth day of September, 1823, he died at Portland on the

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twenty-third day of January, 1893, in the seventieth year of his age. His birthplace was the town of Rumford, Maine, where his early life was passed. His father, Peter Chandler Virgin, was the first, and for many years the only lawyer of the town, to which he had come as a young man from Concord, New Hampshire, a grandson of one of the founders of that city. Judge Virgin's father had studied at Phillips Exeter Academy, and at Harvard College, and when he came from New Hampshire had settled upon lands which had been granted to the family. A word about Judge Virgin's paternal and maternal ancestors could hardly fail to add interest to the sketch of a man who inherited much that was fine and worthy from both sides of his family. The Hon. Peter Chandler Virgin is described as a gentleman of the old school, kind and courteous to all. He lived to great age, and was the senior member of the Oxford Bar. He was also representative to the legislature of Massachusetts, and afterward to the legislature of Maine, and a member of the convention which assembled in 1819 to form a Constitution for the new State of Maine. On his mother's side Judge Virgin was descended from the Massachusetts family of Keyes, whose ancestors settled in Watertown, Mass., about the year 1633. In 1774 Judge Virgin's maternal grandfather removed to New Pennacook, afterward Rumford, Maine, with his brother Jonathan. An interesting tradition of this time occurs in the family records to the effect that, in the autumn, leaving his son in care of the Indians, Jonathan Jr. went back to Massachusetts, and returned in the spring. In March, 1777, Jonathan and his wife and youngest son, Francis, set out from Shrewsbury for New Gloucester, Maine, then a border town, where he left his wife, and then proceeded to New Pennacook, where he commenced a clearing. His wife joined him in 1779, making the journey of fifty miles from New Gloucester to New Pennacook (Rumford) on foot, and was the first white woman in the settlement. Jonathan frequently went to New Gloucester while his wife was there, leaving his son Francis in care of the Indians, who taught him the use of the bow and arrow. In 1781 a party of Indians from Canada made a raid into the adjoining town of Bethel, killed some of the settlers, and carried others into Canada. Keyes and his family fled to New Gloucester, returning in 1783, and found his cabin as he left it, and lived there without further molestation. Those who recall Judge Virgin's strong, powerful frame, with his steady glance and massive head, may perhaps see in them traces of that maternal grandfather who was so early taught and fostered by the Indians.

William Wirt Virgin was fitted for college at Gould's Academy, in Bethel, and at Bridgton Academy, and was graduated from Bowdoin College in the class of 1844. Among his classmates who have become distinguished are: Gen. S. J. Anderson, of Portland; Rev. Henry K. Craig, Plymouth, Mass.; Hon. C. W. Goddard, of Portland; Lewis A. Estes, Wilmington, Ohio, president of the State University; Major D. R. Hastings, of Fryeburg, and Hon. C. W. Larrabee, of Bath, members of the Maine Bar; also, Josiah L. Pickard, LL.D., of Iowa City, president of the Iowa State University; and Dr. Charles E. Swan, of Calais. He studied law in the office of his father, and on being admitted to the Bar, settled in Norway, where he remained until 1871, when he removed to Portland.

He was elected county attorney, and tried during his term of office criminal cases of magnitude with marked ability and success. In 1859 he published Virgin's Digest, a well prepared work, covering volumes twenty-seven to forty-three of the Maine Reports. He supplemented this work with another Digest in 1870, covering volumes forty-four to fifty-six. In 1852 he was appointed Reporter of Decisions, publishing nine volumes of the Maine Reports, volumes

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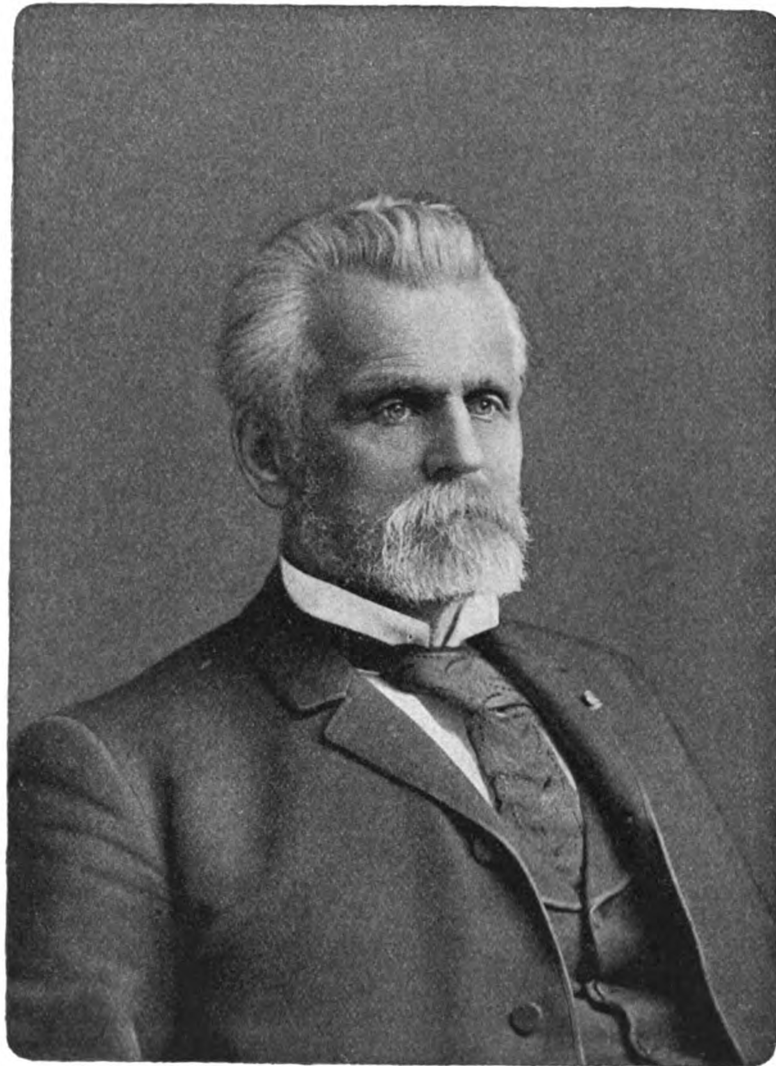

WILLIAM WIRT VIRGIN.

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fifty-two to sixty, from 1852 till 1860, when the exercise of his duties as legal practitioner were interrupted by the opening of the War of the Rebellion. Judge Virgin, then one of the major-generals of the Maine militia, was at once placed upon active duty in the recruiting service, and aided in organizing several of the early regiments that went to the front.

In 1862 Mr. Virgin was commissioned colonel of the Twenty-third Maine Regiment, which was a nine months' regiment, and with others was detailed to defend the approaches of Washington. Although not engaged in those bloody struggles which immortalized the Army of the Potomac, his discharge of the duties of his office won the commendation of the chief executive of the State, and of all others in authority.

In 1865 and 1866 Colonel Virgin represented his county in the State Senate, presiding over that body in 1866, and on December 26, 1872, was appointed to the Supreme Bench. By the accident of politics, Judge Virgin was not a member of the Supreme Court when it handed down its memorable decision in 1879, preserving the State of Maine from falling into the hands of a band of unscrupulous political conspirators.

Judge Virgin's term expired on December 26th of that year, and the Democratic governor, Alonzo Garcelon, would have appointed his successor. The legislature of 1879 passed an act reducing the number of judges to seven, and Judge Virgin was the victim. The succeeding legislature, after the return of the State to Republican rule, with Governor Davis in the chief executive chair, restored the number to eight, and Governor Davis promptly re-appointed Judge Virgin, the Governor using the same pen and ink to approve the act of the legislature, and to write the name of William Wirt Virgin on the nomination book. The appointment was heartily indorsed by public opinion. The proceedings for a mandamus, upon the petition of Nahum T. Hill, to compel the Secretary of State to exhibit the returns, were held before him at Fryeburg, at the December term, 1879, and the application was refused. His nisi prius opinion is published in 70 Maine, 550. Its reasoning is regarded sound, and its effect was salutary. Some people not seeing his name among the judges who prepared and issued the admirable decisions in January following, and reported in the same volume at p. 560, and which gave the death-blow to the Fusion Conspiracy, have reasoned from the refusal of the mandamus that he failed to join his brethren of the Bench from lack of sympathy with them. The real explanation, of course, is that Judge Virgin was not a member of the Bench.

The inside story of the reduction of the number of judges was later shown to have been prompted by certain persons to gain purely personal ends. A. P. Gould and Edmund Wilson, both of Thomaston, and both influential Democrats and personally hostile to each other, were the direct cause of the law limiting the number of judges to seven after Judge Virgin's term should expire. Gould wanted to be appointed judge, and had stated that he would be; and Wilson had determined that he should not be, if he could prevent it. Wilson was a member of the House of Representatives in the legislature of 1879, of which the Fusionists had a large majority. In order to prevent Gould's appointment, Wilson either introduced or had introduced the bill limiting the number of judges to seven. This he was able to do by appealing to the spirit of economy that had taken hold of the Fusionists at that time. The act was as follows, being a part of an act to cut down and regulate the salaries of most of the State officers. That part relating to the judges was: "Judges of the Supreme Judicial Court, each two thousand dollars per annum; as new judges are appointed, and whenever there shall be a va-

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cancy in the office of judge of the Supreme Judicial Court by death, resignation, or otherwise, there shall be no appointment to fill the same, but the number of judges of said court shall thereafter be seven." Laws of 1879, ch. 125. In 1880, ch. 220, the law was repealed.

With the brief interruption already indicated, and which Judge Virgin profitably employed as associate counsel in important cases, he has given twenty years of industrious and faithful work on the Bench. He wrote three hundred and thirty-eight opinions, and is entitled to the credit of promptly discharging this part of his duties. In this respect he was a model of excellence. As they came from his hand they had a certain mechanical finish and neatness that delighted the reader's eye. His reportorial experience made him perfect in preparing his manuscript, and especially in sub-dividing his pages into proper paragraphs — the great aid to clear interpretation so often left to the proof-reader and printer. "He wrote and re-wrote his opinions," says an able lawyer, "with the most studied care, and his grate blazed with the manuscript pages, martyrs for a single fault."

In connection with this the following estimate placed by Chief-Justice Peters upon this branch of Judge Virgin's judicial labors, will bear repeating: "His mind was of a mechanical turn, and he constructed an opinion with as much artistic care as an engineer would construct a government fortification. The grounds for a foundation would be carefully surveyed, simple and solid materials selected, and then be in orderly fashion embodied together, with every point guarded against weakness or attack. All his work was in a mechanical sense nicely consummated." Clearness, force, and accuracy denote the style of his composition. Nor do I recall a single sentence in any of his written judgments that bear a double or doubtful meaning. His love of labor was buoyed up by having that kind and degree of *esprit du corps* that gives solidarity to the Bench, and it was combined with a proper taste that embalms knowledge, which as Disraeli says, "cannot otherwise preserve itself."

It would be easy to cite many of Judge Virgin's opinions that have passed into the solid body of the law, oft cited and quoted by text writers. A few selections will answer the purpose of this sketch. I take them in the order of time. Mosher *v.* Jewett, 63 Maine, 84 (distraint, lien); Carter *v.* Bailey, 64 Maine, 458 (copyright, and non-liability to account to co-owner in the absence of any agreement *inter sese*); McLellan *v.* McLellan, 65 Maine, 500 (evidence sufficient to create a written trust); Grindle *v.* Express Co., 67 Maine, 317 (carriers, measure of damages); Cumberland County *v.* Pennell, 69 Maine, 357 (county treasurer, robbery as a defense); Montgomery *v.* Reed, ib. 510 (deeds, flats, shores); Bolton *v.* Bolton, 73 Maine, 299 (life insurance); Reed *v.* Reed, 75 Maine, 264 (equitable mortgages); Northrop *v.* Hale, 76 Maine, 306 (pedigree, evidence); Nash *v.* Simpson, 78 Maine, 142 (will, life estate); Coburn Will Case, 79 Maine, 35; Deake *v.* Deake, 50 Maine, 50 (fraudulent concealment of will); Gilpatrick *v.* Glidden, 81 Maine, 137 (trust *ex maleficio*); Hare *v.* McIntyre, 82 Maine, 240 (quarry, blasting, fellow-servant). I think Gilpatrick *v.* Glidden is the most interesting in the facts, and was the first of the kind that came before our court. It was a case where a husband and wife were childless and it was decided that where the husband's intention of devising his property to his own heirs was changed and it was devised to his wife by will absolute in form, upon her assurances that she would only use it during her life and devise the remainder to his heirs, the wife would take the property, after his death, charged with a trust in favor of the husband's heirs. The opinion is a masterful one and valuable to the profession for its exhaustive and learnedly illustrated ex-

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amination of both English and American cases.

Judge Virgin made frequent use of the authorities and precedents, and was a good illustration of the remark of Chancellor Kent: "The exercise of sound judgment is as necessary in the use as diligence and learning are requisite in the pursuit of adjudged cases."

He gained early an enviable reputation as a nisi prius judge, dispatching that branch of judicial work easily with satisfactory results. His charges to the jury did not consist of general rules and principles without sound application to the facts of the case, but on the contrary he applied admitted principles to the case, directing the jury to the main contentions of the parties, so that they would be guided to right results. His analysis of the evidence was absolutely fair, clear and strong, giving great help to the jury and requiring a high grade of judicial skill.

Near the close of Judge Virgin's service upon the bench his health became impaired with what afterwards was a fatal illness, and he grew sensitive to annoyance from noise that was out of place. He disliked some of the methods employed by advocates to emphasize their arguments, by slapping their hands loudly together, and would show occasionally his impatience; but he rarely rebuked counsel, and never without good cause.

The Judge was alert for other meanings in life than those purely judicial. He was a lover of nature, fond of hunting and fishing, and withal a good story-teller. His life abounds in incidents of these things.

A story of the Judge's love for fishing and shrewdness in gratifying it, is thus told: He was on the bench when word came that the trout were biting at Weld Pond, and he had a case on the docket for trial. It was a divorce case between an old couple who had lived together for forty years and now wanted to be released from the bonds of matrimony. There were many witnesses, and the Judge foresaw that if the case came to trial it would be four or five days before he could get away; so he sent for the old couple and talked the matter over. He gave them good advice, and they finally agreed to try once more to live together in harmony, and went away happy. The next morning the Judge started for Weld, and soon he landed a twelve pound salmon. If our judges did less divorcing and more fishing, perhaps society would be quite as well off.

Sitting upon the Hubbard House piazza at Paris the Judge was asked by a member of the Oxford Bar regarding the legal qualifications of a practitioner in another part of Maine. His reply: "Mr. —— might sit in this chair while an elephant and a mouse passed up the street before his eyes; of the mouse he could tell you the length of the tail, the texture of the coat and the color of the eye, but it would never occur to Mr. —— that he had seen an elephant!"

Here is a brief sketch by the daily scribe of the press: —

"I stepped into the law court at Augusta, one day this week. Five judges were on the bench. Before each judge, refreshments to cheer them in their sleepy and tiresome audience were placed. These refreshments were simple, but indispensable, consisting of one glass of water and one bottle of ink for every justice.

"In the absence of the Chief-Justice, Judge Danforth of Gardiner, the dean of the court, presided. On the other side of the presiding justice, his chair tipped back and his hand to his head as if buried in thought, is Judge Virgin, second only to Chief-Justice Peters in fame as a story-teller and wit. Judge Virgin is one of the best looking and most carefully dressed of the judges, and excels them all as an elocutionist. In the administration of an oath he puts more force of expression than any man I ever heard."

As Judge Virgin was looking over the docket of the Waldo County Supreme Court he noticed many old indictments for liquor selling undisposed of, and remarked, "I have

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heard that liquor grows better with age, but with these liquor cases it is the reverse."

Some years ago Judge Virgin was holding court in Oxford County, at which a man was on trial for selling intoxicating liquors. The defendant's attorney prefaced his closing argument by telling the jury that he was a strong temperance man himself, and in favor of the enforcement of the law, and that nothing but a firm belief in his client's innocence would prompt him to defend a rum-seller.

In the course of the prosecuting attorney's argument, the attorney for the defendant stopped him and appealed to the court that he was arguing facts that were not in evidence. "Very well," said Judge Virgin, "you set the example." "I am not aware that I did," replied the attorney. The Judge replied: "You certainly argued to the jury for a long time that you were a strong temperance man, and I have not seen any evidence of that fact yet."

He thus pays tribute to the memory of a brother lawyer, the late E. S. Ridlon, Esq., in which he portrays some of the solid elements of his own character: —

"He always seasonably and diligently prepared his cases, and in the trial of them he carefully and methodically marshaled the material facts and clearly presented the law which he believed governed them. He wasted none of the public time in idle and excessive cross-examination. He never possessed but eschewed in others the 'talent of turbulence,' nor did he ever disclose any of that vanity which seemed to lead him to suppose that the court and jury knew but little of all he knew. His honesty of purpose ruled all his professional conduct. He was not obliged to study professional ethics, for his instincts directed him aright. His professional and private conduct had ripened into character and woven of the same web, the warp of which were made up of the golden threads of sound moral principle. His arguments to court and jury were clear and earnest. He did not hide the poverty of ideas in magnificence of style, but spoke to convince and not to impress, having that 'discretion of speech' which Lord Bacon considered a faculty greater than eloquence."

As a reader of current literature Judge Virgin kept abreast with the times, but found his favorite authors in New England. He was especially fond of Bryant, Holmes, Longfellow, Whittier, and would frequently quote David Barker, that "Yankee Burns," as he would call him. He loved to indulge his fancy for quaint epitaphs, a good collection of which I have seen in his scrap-book. As a letter writer, the sunny side of his nature appeared to the best advantage. The wise and witty sayings that flowed from his pen, often illustrated with pen-drawings and caricatures, sometimes drawn while sitting on the bench, constantly remind me of Thackeray. As a journalist and author he would have succeeded well. His love of nature, poetry and music would have given a true artistic touch to his fine powers of description.

In reviewing Judge Virgin's life as a whole I think its best lesson is beautifully touched upon by his personal friend, Chief-Justice Peters, who, speaking of his laborious, useful, dignified and honorable life, has well said: —

"The only compensation which he personally received for these almost life-time services, besides such an ordinary livelihood as the judicial salary affords, was the consoling reflection, while he lived, that every duty devolving upon him had been fully and conscientiously performed, and that he should after this life leave an honorable record behind."

Upon Judge Virgin's death, Governor Cleaves, in honor of his exalted character and services, issued a proclamation worthy of inscription in monumental bronze, and containing his estimation of Judge Virgin in these words: —

"He was an honored citizen, an able and upright judge, of untiring industry, of the strictest integrity, faithful in the performance of every duty, and one whose decisions were always grounded upon the broad and safe principles of truth and right."

Broad and philosophic in his views, pos-

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sessing a deep and unostentatious religion that embraces the whole human family, he could well say: —

> Death has no terrors, fears, nor pains,
> From life to bar my way:
> I go as from Siberian plains
> To gardens of Cathay."

ARTEMAS LIBBEY, associate justice of the Supreme Judicial Court of Maine, was born at Freedom, in the County of Waldo, on the eighth of January, 1823. In 1825 his family removed with him to Albion, where he continued to reside, attending the town schools, working upon the farm, and acquiring as best he could the rudiments of common-school education. His youthful ambition was for something higher than a farmer's life, and so at the early age of seventeen years we find him pursuing the study of law in the office of Samuel S. Warren, of Albion, where for the subsequent four years he continued his studies, varying it winters by teaching the town schools. In the summer of 1844, Mr. Warren removing to Massachusetts, Mr. Libbey then entered and completed his course of studies in the office of Z. Washburne, of China, and in the fall of that year was, at the age of twenty-one, admitted to the Kennebec Bar, and shortly afterward opened an office at Albion. Here he continued in the practice of law with varying success, and somewhat increasing clientage, until at the end of eleven years he removed, in 1858, to Augusta, where he resided until his appointment as one of the justices of the Supreme Bench, April 24, 1875, a fitting successor to Judge Cutting, to whom he bore considerable resemblance for directness and simplicity of character. Mr. Libbey must have had an early consciousness and premonition of his intellectual strength and acumen, for he began at once to manage and try cases, relying solely upon himself, — a most important condition of success to the young lawyer. As an illustration of Mr. Libbey's early sagacity and good judgment in the management of cases, it is related that in the second year of his practice he was retained to defend a client before a country justice on a charge of assault and battery. After the complainant's testimony was all in, he did not deem it sufficient to convict his client, and declined to offer any evidence in defense. The prosecuting attorney insisted that the defendant should be compelled by the court, according to the then prevalent custom before a justice of the peace, to put in his side of the case; but Mr. Libbey firmly refused. This was a new method of procedure to the justice, who began immediately to consider the situation, and, after a little reflection, turned to the young lawyer and said: "*Sagacious young man! Know better than to put your client on and 'spile' your case! The defendant is discharged!*"

All the information I have been able to elicit directly from Judge Libbey himself, for he was always reticent in purely personal matters, is contained in the following words: "I was admitted to practice at the October term of the Supreme Judicial Court, Kennebec County, 1844, at the age of twenty-one; and my practice was mainly in that county, but was extended into several other counties, in important cases, Lincoln, Androscoggin, Sagadahoc, Somerset, Franklin, and some others, and in the Federal courts somewhat." His reputation at the bar, however, was soon established, and for many years before he went upon the bench he stood in the very front of his profession. Wholly devoted to his chosen calling, he added great industry to perceptive qualities that were remarkably quick and clear as well as strong. Besides rare powers of discrimination, he had a good deal of natural sagacity and common sense. In a fine and discriminating analysis of his prominent judicial qualities, Chief-Justice Peters has well said: "These qualities were supplemented and supported by a strong will. He was a resolute, self-reliant man, independent

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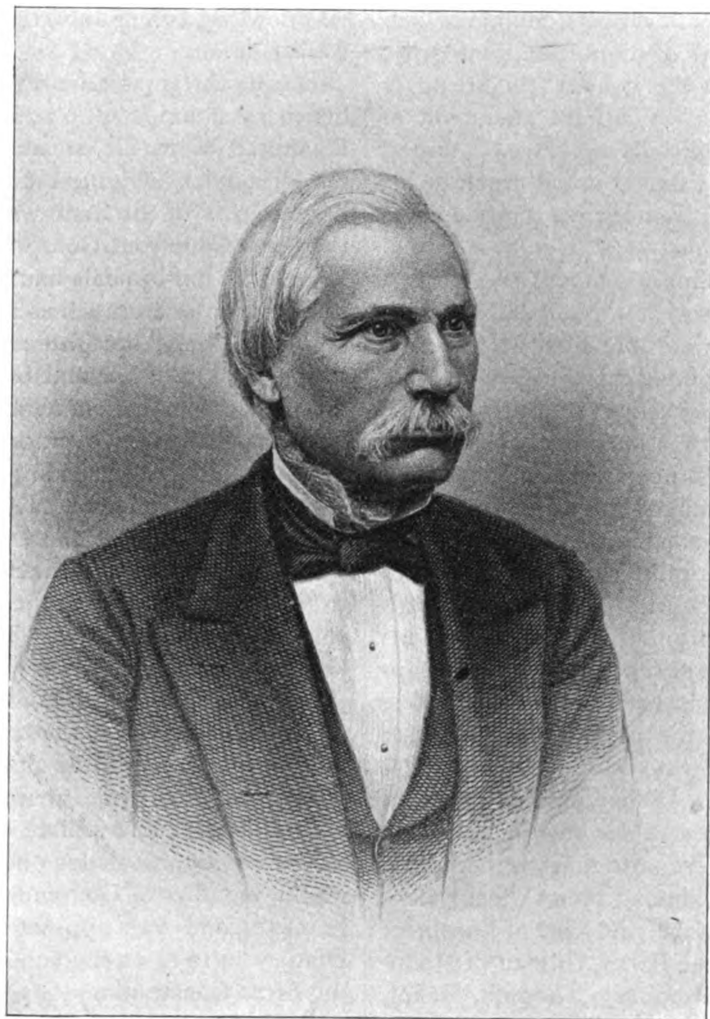

ARTEMAS LIBBEY.

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in thought and action, and unalterable in his inclination to do what he believed to be right. He knew his own mind, and always had the courage to act upon his own convictions." I think the reader will be now prepared to believe that no member of the Bar, having such endowments, combined with the highest ideal of honor and integrity, stood better with the court. As he never misled the court with a false statement of law or fact, he rightfully possessed a strong personal influence that counted much in his favor. His word was always a good legal tender.

Upon Mr. Libbey's removal to Augusta he soon won his way to a good and lucrative practice, having desirable clients that he retained until appointed to the Bench. He had a good knowledge of business that served him many ways and made him a useful and safe bank-officer. He had that clear perception and sound judgment that made him especially valuable in investing trust funds. He began quite early to argue cases before the law court. The extent of his practice is seen from the frequency of his cases in the printed reports. His name appears as attorney in twenty-one cases in one volume alone, — the sixty-second volume of the Maine Reports.

At the time Mr. Libbey entered the profession, among the elder members of the Kennebec Bar there were many experienced and able lawyers, among them Allen, Evans, Whittemore, Danforth and Clay of Gardiner; Clark, Wells, Paine, Baker, Gilman of Hallowell; Williams, Bradbury, Titcomb, Baker, Rice, and Lancaster of Augusta, and many more whose lives were full of devotion to their profession, and but few of whom are now living.

Judge Libbey's arguments were not long; and though not an orator he reasoned logically and well, marshaling in the facts that bore upon the vital issue to the safe and easy comprehension of the jury.

He was the first Democrat appointed to the Bench of Maine after the resignation of Judge Rice, and when the policy was adopted of giving the minority party a representative on the bench, he was selected with great unanimity. The appointment came to him without solicitation, and he had no knowledge of it until the announcement was made.

During Artemas Libbey's service on the bench his courage is in nothing so signally illustrated as in his steadfast devotion to the principles of honest government when the integrity of the State was threatened by the great Count-out Conspiracy. He was a Democrat, but appeals and threats failed to swerve him by so much as an inch from the path of judicial uprightness and an earnest championship of law and order. He stood for justice with his eminent colleagues, and justice prevailed. Governor Plaisted refused to re-appoint him, sending in the names of several other Democrats, including William L. Putnam, but the executive council refused to become a partner to this attempt to punish an upright judge, and refused to confirm the nomination. The first act of Governor Robie, in 1883, was to re-appoint Judge Libbey, and the nomination was immediately confirmed, to the great satisfaction of the people of the State.

He had very little personal interest in politics beyond the welfare of his State, and was never ambitious for office, although he was a member of Governor Wells's council in 1856, and was appointed by Governor Dingley in 1874 on the commission to revise the State Constitution.

Of Judge Libbey as judge and advocate it may be said that he was the Pygmalion to the Galatea of abstract justice, infusing life into what would otherwise have been but a mass of lifeless, cold facts. In Chief-Justice Peters's eulogy on Judge Libbey he has brought out this trait of his character in forceful and beautiful language: —

"How full of significance are facts in their infinite forms when truly interpreted! How full

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of light and logic and even of eloquence to some minds, and how full of darkness merely to other minds! It has been said that any block of marble may contain beautiful images, which the sculptor only can chisel out!"

Without the inheritance of culture which enables so many men to absorb and assimilate without effort certain material of education and acquirements of taste, Judge Libbey's instincts were ever in the direction of refinement, and he had accumulated, by following these instincts, a knowledge of literature, history and poetry, which made him prefer for his friends women of cultivation rather than men of affairs. Beneath a somewhat rugged and stern manner lay the tenderest of hearts, which ever responded to the mute appeals of horse and dog. Like others cradled in poverty, he allowed himself, even when in possession of a competency, but few luxuries and indulgences, but among those were horses, dogs, and books.

Of his legal bias, the reports show that Judge Libbey was especially fond of constitutional questions, and that he was familiar with all such cases in the Supreme Court of the United States. But he was in no way a specialist, for he possessed a thorough knowledge of the common law. He was not over-fond, we are told, of writing opinions, and took greatest enjoyment in the duties of the nisi prius terms.

In his habit of mind, in his treatment of cases, in his expression of opinion, there is nothing more noticeable than the straight and direct methods he employed. As there was no circumlocution about his arguments, neither was there any compromise or "trimming" in his mental processes. It has even been said of him that he wasted neither thought nor words, but was able to command only arguments that were effective and pointed. To use the apt words of Chief-Justice Peters, he sent "bullets rather than shot."

In a large degree Judge Libbey possessed the judicial bearing, and was rarely anything but composed in manner, however deeply stirred he might be in spirit. This did not, however, prevent him from stirring his jury by charges that were not only clear, logical, and concise, but fervid and forcible. "The gentleman is always serene," and Judge Libbey was one of the most serene gentlemen who ever sat on the Supreme Bench of his State; yet the man who relied too much upon that serenity for an easy verdict, soon found that above the serenity of the man sat the majesty of the law. His charges to the jury were as impartial as one of his strong convictions and clear perceptions can be expected to be; but the jury rarely failed to draw the correct inference concerning his judgment upon the facts. He deemed it a part of his duty to see that justice was done, and for that purpose to call the attention of the jury to any material points in the evidence which might be omitted accidentally by counsel.

After a conspicuous illustration of this course, a fortunate suitor said to his friend: "My lawyer's talk to the jury didn't amount to a row of pins, but that old white-headed chap on the bench made a d—d good argument for me. I don't know how he happened to do it; I never said a word to him, nor give him a cent."

Among his cases that may be classed as oft-cited, I will mention a few. Nobleboro *v.* Clark, 68 Maine, 89, treating of the authority of an agent to execute a deed in behalf of his principal, and when it must be regarded as the deed of the principal, though signed by the agent in his own name; Heath *v.* Jaquith, ib. 435, holding that if a party having the burden of proof necessary to maintain an action, or to the defense of a *prima facie* case, introduces no evidence which, if true, giving to it all its probative force, would authorize a jury to find in his favor, the judge may direct a verdict against him; Wing *v.* Rowe, 69 Maine, 282 (guardian and ward); Moulton *v.* Scarborough,

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71 Maine, 269 (town's liability for negligence of its agents); Simpson *v.* Garland, 72 Maine, 40 (principal and agent, bills and notes); Bessey *v.* Vose, 73 Maine, 218 (amendments of officer's return); Coolbroth *v.* R. R., 77 Maine, 167 (master and servant); Howe *v.* Patterson, 78 Maine, 229 (liens, when not affected by insolvency); Pierce *v.* Stidworthy, 79 Maine, 234 (Alabama claims). During the almost nineteen years that he was a judge he wrote two hundred and forty-six opinions, averaging nearly thirteen per annum; but much more than that after making due allowance for disposing of cases by rescripts when not involving any new point of law. Of his leading cases three or four may be mentioned as showing his style and directness. Spofford *v.* R. R. Co., 66 Maine, 26, treats of the taking of land for public uses, and holds that the railroad commissioners exceeded their powers. In it is this salutary rule: "Judicial discretion is to be exercised in accordance with the established rules of law." He hated fraud, as see R. R. *v.* Mayo, 67 Maine, 470, and Thompson *v.* Pennell, ib. 159, in the last named using these terse words: —

"If a trustee comes into court and sets up a fraudulent claim of title, he cannot invoke equity. If the decree will be a hardship to him, it results from the position he has voluntarily and deliberately assumed, and which, if he should bepermitted to succeed, would defraud the plaintiff."

Stratton *v.* Currier, 81 Maine, 497, states the rule regulating dams and storage-waters. Bangor *v.* Smith, 83 Maine, 422, holds that our statute requiring common carriers to remove paupers is an attempt to regulate interstate commerce and unconstitutional. Thatcher *v.* R. R. Co., 85 Maine, 502, sustains a verdict for damages to a lumber-yard caused by fire from a locomotive, and determines rules of evidence applicable to such actions.

Although apparently a reserved and austere man, Judge Libbey possessed great kindness of heart, and rarely, I believe, allowed an opportunity to pass unimproved of extending a helping hand or of offering a word of advice or encouragement, particularly to persons just starting out in life, and more especially if the service could be rendered without causing observation or remark.

His former partner, Daniel C. Robinson, Esq., now of the Boston Bar, thus relates an incident illustrative of his interest in young men: —

"I shall always revere his memory for his kindness to me in early life. At the request of friends I had decided, somewhat reluctantly, to settle in Worcester, Mass., and in the spring of 1874 was on my way thither, having secured an office there, when I met Mr. Libbey on the train. He was going to Wiscasset, where he expected to spend a week at the April term. He inquired with genuine interest concerning my progress and plans for the future, and discussed with me in the most kindly manner my project of settling in Worcester; and finally suggested that I give it up altogether and come to Augusta and become his partner. Doubtless he imagined that this would be gratifying to to me, as I had relatives and friends living there with whom he was well acquainted.

"He advised me to take a few days to decide about the matter and then join him at Wiscasset. I did so, and on a beautiful moonlight night, a few days later, while pacing the long, old bridge that spans the river there — a practice, by the way, which he dearly loved — he stated to me the terms upon which I should become his partner and share the profits of his already large and rapidly increasing business. Certainly, nothing could have been more generous than the terms proposed. Certainly, no young man was ever more kindly advised or cordially welcomed to participate in the pleasures to be derived from business relations with an old and successful practitioner than myself."

Judge Libbey was a most persistent fisherman. He went for a great number of years to Moosehead Lake, and in the early days had great sport there "casting the fly." A favorite spot at that time, although long since abandoned by modern anglers, was a

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large rock a few rods from the shore at the point where Mt. Kineo slopes to the water's edge on the west side. To stand upon this rock and cast out into the lake was considered the par excellence of sport.

Although the rock had long since been abandoned and much better luck obtained elsewhere by other fishermen, the Judge *never* abandoned it, and thither he went, day after day, year in and year out, during the season, and there he could always be seen, standing sometimes knee-deep in water when the rock happened to be submerged, his tall, dark form and flowing white hair outlined against the rocks of Kineo or the blue sky beyond, quietly, patiently, persistently, and usually alone, making his "casts."

No amount of coaxing and no amount of banter by his friends would induce him to seek, — except for a very brief period,— any other spot.

The result, as told by a contemporary, almost invariably was, that "at the round-up in the evening, Libbey usually had the largest string." For, to use his own words, "During all the hours that the other fellows were paddling or traveling about hunting for better places, I had my flies in the water, and occasionally I'd get a strike."

Judge Libbey had but little of what society calls small talk, and people were often impressed with the prolonged silence that would come into the conversation. I used to think it was in condemnation of every-day chatter until I learned better. He loved to hear merry talk, and could join in it, too; but his words were few because they all meant so much. He was a great lover of a good story, and had great enjoyment in telling or hearing one. He liked the old authors, especially Gibbon. He played at whist with much skill, and enjoyed walking. His quiet manners were impressive, as they were part of his dignified and majestic person. His very calmness, quiet, placid self-containment gave his life the higher rank. He died at his home in Augusta, the fifteenth of March, 1894, after a short illness, which was the culmination of an infirmity that had been wasting his bodily vigor during the last two or three years of his life.

I never attended more sincere memorial exercises upon the death of a public man than those in honor of Judge Libbey, held at the ensuing May Law Court, and which are to be found in full in the eighty-sixth volume of the Maine Reports.

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ROUNDABOUT JUSTICE.

THE maxim, "All's well that ends well," has a comforting, encouraging, philosophic ring, and seems therefore to be generally accepted and approved by the easy-going. The more cautious and alert, however, realize its dangerous tendencies, and denounce it as unprincipled, and altogether unsound in theory — an execration almost as bitter as is evoked by its sister statement, that "the end justifies the means." Without placing ourselves in the category of the easy-going, no matter where our *sympathies* are, and without distinctly taking sides with the energetic and cautious, who certainly have our unbounded respect, we will maintain a thoroughly neutral position by referring to a case which might, perhaps, be cited as an authority supporting both contentions. The circumstances are set forth and commented upon by the annotator of the report in which it appears in the following manner:[1] "This case," it is observed, "will be best understood by considering the whole affair as a drama in five acts, and the positions of each party at the end of the respective acts.

"I. Breman, being the owner of a cow which Hoag unlawfully detains, replevins the cow from Hoag, thereby obtaining possession of the cow; but having brought the suit informally (by joining his wife as plaintiff), submits to a non-suit, whereby, under a statute which assumes that his possession, obtained by the writ of replevin, is wrongful, judgment is rendered in favor of Hoag against Breman and wife, for the value of the cow; at this stage of the proceeding, Breman holds the cow, and Hoag a judgment for its value.

"II. Breman sues Hoag in *Trover* for the cow, and though plaintiff has the cow then in his possession, recovers a judgment against Hoag for her value. It is difficult to see upon what theory this judgment was rendered, unless it was that the court and jury wanted to provide Breman with a set-off against Hoag's judgment. At this stage of the conflict, Breman, the *rightful* owner, holds the cow by *wrong*, but each party has a judgment against the other for her value. Setting off the two judgments against each other, Breman would hold the cow by right.

"III. Hoag pays Breman's judgment in *Trover*, instead of offsetting his own judgment against it, and now, abandoning his original claim, resorts to a new ground of title, whereby he claims through Breman by a title which dates only from the payment of Breman's judgment in *Trover*. Breman, at this stage of the controversy, is trebly armed. He has the cow, the price of the cow, and the memory of a judgment which he once held against Hoag for her value.

"IV. Hoag, still holding his unsatisfied judgment for the cow (the one obtained by non-suit), replevins the cow under his new source of title (acquired by satisfaction of Breman's judgment in *Trover*), thereby getting possession of her, whereupon the court intimate some doubt whether the acceptance of the judgment in replevin for the value of the cow by Hoag, was not a *conversion* of the cow by him (it would seem rather that it would transfer title in the cow to Breman). But the court holds that the case has clearly only two alternatives. Either Hoag's judgment in replevin against Breman was a wrongful conversion of the cow by Hoag, or the court, in Breman's action of *Trover*, erred in giving judgment for the full value of a cow which Breman then had in his possession. But Hoag by paying the judgment acknowledges its rightfulness, and therefore, the cow which has been judicially found to have been lost by Breman and found by

[1] See Hoag *v.* Breman and wife, 3 Mich. 160.

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Hoag, and which Hoag has been declared judicially liable to pay for, and *has paid for,* is now judicially held to belong to Breman, who holds in his pocket the pay adjudged to him for the cow in his *Trover* suit, and now takes another judgment for the value of the cow in replevin. At the end of the fourth act, therefore, Hoag holds the cow and one judgment in replevin against Breman. Breman holds the pay he has received in his action of *Trover,* and one judgment in replevin against Hoag.

"V. Setting off the two judgments in replevin against each other, Hoag, who at the beginning of the controversy had no title to the cow, now has the cow, and Breman has the pay which he collected on his judgment in *Trover.* It is easier to see that the result is just than that the final decision accords with legal principles. *Fiat justitia, ruat coelum.*"

While no one will deny that such a random, roundabout and irregular course of proceedings should be condemned as productive of confusion, and as destructive of the outlines of clear-cut legal doctrines, all must admit that, in the end, substantial right and justice was attained, — the object and aim of the law, to which all else, if necessary, should be subordinated. A. R. W.

LONDON LEGAL LETTER.

LONDON, Feb. 4, 1896.

IT is not often that an act of legislation in the United States becomes a matter of personal concern to the people of England, but for some years past the laws which have been passed by Congress to prevent the disposal of lands in the Territories to aliens, and the non-resident alien legislation in many of the States, have curiously affected financial operations in this country. So far as any harm has been done, or any embarrassment is felt, it is very probable that the harm and embarrassment are most keenly experienced on your side of the Atlantic. The following incident which has come to my knowledge within the past few days will illustrate the awkward working of the legislation to which I refer. In one of the Western Territories a concession was obtained by residents of the Territory from the United States Government to erect certain works which are greatly needed in the Territory, and which in the course of a very few years would unquestionably add to the value of the soil and induce an influx of immigration which would treble or quadruple the population of the district. In order to work this concession, a joint-stock company was formed under the laws of the Territory, but it was found to be impossible to sell, at home, the shares in sufficient quantity to raise the capital required to erect the works, or to borrow the money necessary for that purpose. The Territory is a new one; its rich resources are poorly developed, and the people, affluent in everything but money, are not yet of the investing class. An agent was despatched to London to procure the necessary funds. He found upon his arrival that there were millions of pounds sterling here awaiting profitable investment. He disclosed his scheme, satisfied the financial agents that it was a safe and profitable one, and obtained their assent to it. A company was formed under the English Companies Act, to subscribe to all the shares of the American Company, and a prospectus calling for subscriptions was about to be issued, when the opinion of counsel was taken as to the powers of the proposed company to make an investment in the Territory in question. Pending this report arrangements were made for the entire capital required, and it was assumed that the whole matter would be successfully completed within a comparatively few days.

Unfortunately, the opinion of counsel disclosed the fact that a law of the United States Congress, passed March 3, 1887, provides that no corporation or association, more than twenty per cent. of whose stock is owned by any person or corporation not a citizen of the United States, shall acquire, hold, or own any real estate in any of the Territories of the United States. As the American corporation, whose shares it was proposed to take up, would be unable to carry on its business unless it might acquire land in the course of its business operations, and for their purposes, this act at once put a stop to further negotiations. It was then suggested that the English company acquire the American company's franchise, and carry on the business; but the first section of the act above quoted provides that it "shall be unlawful for any person or persons, not citizens of the United States, or who have not lawfully declared their intention to become citizens, or for any corporation not created by or under the laws of the United States, or of some State or Territory of the United States, to acquire, hold or own real estate in any of the territories."

As the projectors of the English company could, therefore, neither as individuals nor as an incorporated company, invest their money in the American company, or buy its property, or loan it money, there was therefore nothing to be done, and they withdrew from the negotiation. As far

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as they are personally concerned, the failure of the proposed enterprise was a matter of no consequence, as there is always a demand for capital, and remunerative enterprises are not difficult to discover. But to the agent of the territorial enterprise and the people whom he represented it means a disheartening disappointment, and the failure, or at least tedious postponement of an undertaking of almost incalculable value.

In one of his lectures on Law and Jurisprudence in England and America, Judge Dillon paraphrases Proudhon's often quoted maxim, "La Propriété c'est le vol," as "Property holders are thieves," and says that "this pernicious doctrine has hitherto found no general acceptance among our people or their legislators; and under the Constitution as it now stands the doctrine can obtain no foothold as to any species of property if the courts are faithful to their high trust as the guardians and defenders of the Constitution." But if the maxim should be translated "Alien property holders are thieves," it will be found that this pernicious doctrine has found a very general acceptance among the people of the United States, or at least those who legislate for them, in the West and the newer parts of the country. It is not only peculiarly unfortunate that this restrictive legislation should have been enacted in that part of the community where capital and money are most needed, but that the craze for this sort of restraint on foreign investments has so taken hold upon the community that whenever the opportunity occurs the old and broader laws are amended by putting them in shackles. While, generally speaking, the New England, Middle and Southern States put non-resident aliens on the same footing so far as holding real estate is concerned, with their own citizens, there are a few notable exceptions. Connecticut alone is the exception in the New England States; while New York stands with Mississippi and Kentucky among the Middle and Southern States as being opposed to the selling of real property to her resident aliens. On the other hand, Ohio, Michigan, the Dakotas, Nevada, California and Oregon are the only States in the West and in the Southwest which show no discrimination between non-resident aliens and citizens.

The experiment of restriction has been tried long enough now to afford some test of its results, and it would be interesting to have testimony on this point. If New York, for instance, has an advantage over Massachusetts by reason of this law, wherein does the advantage consist, and what ill that Massachusetts suffers from has New York escaped? It would be instructive also to know how the rule works in the West, and particularly in the newer States, where capital is needed to develop the country, and population is small. What advantage have Kansas and Nebraska, for example, over the Dakotas and Colorado? And what has Washington gained that Oregon has lost?

Is it not possible, on the other hand, that the experiments, so far as they can be ascertained, will show that this restrictive legislation has been a mistake, that it was based upon a wrong assumption of an impossible menace, and that it has not the assent of the thoughtful legislators who usually stand in between the clamor of demagogues and the enactment of useless and harmful laws? Absentee landlordism, it may be admitted, is a curse to Ireland, but it by no means follows that the same results would follow the holding of a portion of the unproductive acres of the Western territories by non-residents, or the investment of foreign capital in the realty of even more populous and better developed communities. As the law now stands it is impossible for an owner of land in many of the States of the Union to deal with his property to advantage; and this right he has lost in the majority of, if not all, the instances without any compensating advantages.

STUFF GOWN.

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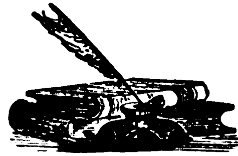
The Lawyer's Easy Chair.



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

.·. .·. .·. .·. .·. BY IRVING BROWNE. .·. .·. .·. .·. .·.

CURRENT TOPICS.

An Assassin's Handwriting.— Since paying his compliments to Mr. Schooling, the British expert in handwriting, who discovered that Napoleon was such a villain because he wrote such a villainous hand, the Chairman has turned up a forgotten MS. in his own archives, which he would like to show Mr. Schooling without disclosing the writer. The writing is exceptionally uniform, fluent, legible and elegant, and yet it is the writing of a lunatic and an assassin — the writing of Guiteau! Not one lawyer in a score writes such a beautiful hand. Certainly the Chairman does not, nor does any of his correspondents save Judge Finch and Judge Dillon; nor of his correspondents who are gone can he recall any who wrote so well, except Judge Folger. The MS. is chiefly in a stiff clerk's hand, but it contains many additions and alterations in Guiteau's own hand. It is extensive, and is the draft of an opening speech to the jury, which Guiteau proposed to deliver in his action of libel against the New York *Herald*, but which never came to trial. It exhibits a good degree of tact and adroitness, although here and there crops out a crazy idea. For example: one of the *Herald's* charges was that he had collected moneys for certain clients which he appropriated to himself. Guiteau explains this by saying that, in the case referred to, he had an agreement to collect the claim on shares; that he had collected his own share, and that just as soon as he collected his client's share he proposed to remit it! Another hand which the Chairman would like to submit to Mr. Schooling is that of David Dudley Field, which is one of the worst imaginable.

Literary Advertising.— This Chair had something to say recently about the ingenious devices of literary advertising in modern times. A new device is shown in a late number of *The Critic*, that most excellent of American literary journals. It consists in getting up or inflaming a quarrel between two authors, by means of which, narrated in the newspapers, they are made to puff and advertise one another. It seems from *The Critic* that once upon a time a lady gave a reception to Crawford, the novelist, at which Miss Wilkins was present, and with two hundred and ninety-nine others was presented to the lion, and that he failed to recognize her as a well-known story writer and to compliment her; whereupon her woman friends felt grieved and said he ought to be ashamed of such ignorance and ill-manners. Whereupon the two writers proceed to write at each other through the hostess, Miss Wilkins protesting that she did not think it strange and did not feel hurt, and Mr. Crawford protesting that he ought not to be held to such instant recognition of Miss Wilkins, whom he had never met before, and that he did not mean to be rude, and each praising the other's works to the skies. All at the extent of a column and a half of *The Critic's* valuable space, and forming an excellent advertisement of Miss Wilkins and her somewhat trifling wares. The only wonder in the premises is that on being "introduced," Mr. Crawford did not ask Miss Wilkins if she was a member of the Micawber family.

Liberty Pole Nuisance.— Taking down another book — not an old one this time, but the very newest — Mr. Roger Foster's admirable "Commentaries on the Constitution of the United States," and opening at random in volume 1, at page 661, we read that Alexander Addison, a Pennsylvania common pleas judge, about 1802, charged a grand jury that a liberty pole was a nuisance. He had been a Presbyterian preacher, and was an extreme Federalist, who hated the Democrats and denounced all who sympathized with the French Revolution. He was removed from office in 1803. The Supreme Court of that State, in City of Allegheny *v.* Zimmerman, 95 Pa. St. 287; 40 Am. Rep. 249, held that a liberty pole is not *per se* a nuisance. This was erected by the Republicans. The Court uttered some very patriotic sentiments, saying, "It is a custom sanctioned by a hundred years, and interwoven with the traditions, rights and memories of a free people. The people so desired it. The municipal authorities assented to it." Justices Gordon and Trunkey dissented. In Dreher *v.* Yates, 43 New Jersey Law,

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476, the Court held that "a flag-staff placed in a public street is *per se* a nuisance," because it is an obstruction to the use of the entire area of the street. It does not appear what the politics of the pole were, nor that it had any, but the city officers were held justified in removing it as an obstruction to the street. Why this judicial prejudice against liberty poles, when all the city streets are so encumbered and rendered unsightly by wire-bearing poles in the interests of greedy corporations who ought to bury their wires?

The Kansas Court have held that a stone post at a street-corner to protect a shade-tree is not necessarily a nuisance, although partly concealed by grass and weeds. (City of Wellington *v.* Gregson, 31 Kan. 99; 47 Am. Rep. 482.) If such tenderness is indulged toward a mere natural tree, how much more should the courts foster and protect the tree that bears the symbol of our liberty and power! The American Flag — "Old Glory" — cannot and never shall be buried. "Forever float that standard sheet!" *vide* Fitz Greene Halleck and Daniel Webster.

A Funny Misprint.— A very amusing typographical error may be found in sec. 943 of Bliss's edition of the New York Code of Civil Procedure, edition of 1883, where "United States" is printed, "Untied States." If this had occurred twenty years earlier it might have been the work of a Confederate printer. As it stands, it may take rank with that famous misprint which has rendered one edition of the Bible famous, by which the Commandment is rendered, "Thou shalt commit adultery."

"Law Book News."— This periodical comes back on the Chairman in a very mild way, in its December number, in respect to Mr. Beach's numerous law-book progeny. We might retort, but we forbear, because the "News" would have no opportunity to reply. The December number is its last. It will be sincerely regretted by many that its publicacations is discontinued. It has had a very honorable and useful, although short, career. Its plan was unique and admirably executed. Its editorials were always keen and interesting. Although issued in the particular interest of one great publishing house, its criticism and judgments were uniformly candid and impartial, and it gave due notice of all legal publications during its time. The Chairman will greatly miss it, for he found it much pleasanter reading than the "Reporters." But after all, this discontinuance is the fault of the publishers themselves, for they have done much to make the legal profession care for nothing but "the last case."

NOTES OF CASES.

Warning to Infant Employees.— It is a familiar principle of the law of master and servant, that a servant of mature years and judgment takes upon himself the risk of obvious dangers in the employment. An exception is generally made to this rule, in substance as follows:—

"If the employment is dangerous beyond what manifestly appears, or if the servant is not of sufficient age or discretion to understand the manifest risks, it is the master's duty to notify him of the danger; and in the case of an inexperienced person the master is bound to instruct him how to avoid the danger." (Browne on Domestic Relations, page 128.)

Some apparent conflict has arisen in the courts as to the duty of an employer to point out obvious dangers to an infant employee. Much of course depends upon the age and intelligence of the infant, and fourteen years seems to be the age at which, by some of the courts, the infant is deemed to be *sui juris* in this respect. Some cases however hold a stricter rule. Thus in Atlanta, etc., R. Co. *v.* Smith, 94 Ga. 107, it was held that there is no legal presumption that a minor above fourteen needs no warning or instruction. In Dowling *v.* Allen, 74 Mo. 13; 41 Am. Rep. 298, it was held that an inexperienced boy of seventeen, put to work on visibly dangerous machinery, was entitled to warning of the danger from the employer. The Court cited Grizzle *v.* Frost, 3 Fost. & F. 622, where the infant was a girl of sixteen; and Coombs *v.* New B. Cordage Co., 102 Mass. 572; 3 Am. Rep. 506, where the boy was fourteen, and the machinery was unguarded gearing in plain view. This is also the doctrine of Sullivan *v.* India Manuf. Co., 114 Mass. 396, where the child was fourteen. There the Court said:—

> "It may frequently happen that the dangers of a particular position for a mode of doing work are great, and apparent to persons of capacity and knowledge of the subject, and yet a party, from youth, inexperience or ignorance, or general want of capacity, may fail to appreciate them. It would be a breach on the part of a master to expose a servant of this character, even with his own consent, to such dangers, unless with instructions or cautions sufficient to enable him to comprehend them, and to do his work safely, with proper care on his own part."

So in O'Connor *v.* Adams, 120 Mass. 427 (boy of 20). The same was held, in the case of a boy of 16, in Hill *v.* Gust, 55 Ind. 45, citing a long list of cases, and in Railroad Co. *v.* Fort, 17 Wall. 554, when the boy was 16, the Court observing: "It was a wrongful act on the part of Collett to order a boy of his age and inexperience to do a thing, which in its very nature was perilous, and which any man of ordinary sagacity would know to be so." This doctrine is strongly implied in Larson *v.* Berquist, 34 Kans. 334; 55 Am. Rep. 249 (the *menses* case), and is recognized in New

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York; Hickey *v.* Taafe, 105 N.Y. 26, 36. See also to the same effect, Glover *v.* Dwight Manuf. Co., 148 Mass. 22; 12 Am. St. Rep. 512; Kehler *v.* Schwenk, 151 Pa. St. 505; 31 Am. St. Rep. 777 (child of 14); Rummel *v.* Dilworth, 131 Pa. St. 509; 17 Am. St. Rep. 827 (boy of 17); Tagg *v.* McGeorge, 155 Pa. St. 368; 35 Am. St. Rep. 889 (boy of 13); Smith *v.* Irwin, 51 New J. L. 507; 14 Am. St. Rep. 699 (boy of 17, a circular saw case), where a charge that "unless the instructions and precautions given are so graduated to the youth, ignorance and inexperience of the servant as to make him fully aware of the danger to him, and to place him in substantially the same position as if he were an adult," the master's duty is not discharged, was approved; and to the same effect are Chicago, etc. Co. *v.* Beinnegar, 140 Ill. 234; 33. Am. St. Rep. 249; Texas, etc. Ry. Co. *v.* Brick, 83 Tex. 598 (child of 19); New Albany, etc. Mill *v.* Cooper, 131 Ind. 363 (child of 19); King *v.* Ford Lumber Co. 93 Mich. 172 (child of 13); May *v.* Smith, 92 Ga. 96; 44 Am. St. Rep. 85 (child of 17); Cleveland Rolling Mills Co. *v.* Corrigan, 46 Ohio St. 283; 3 L. R. A. 385 (boy of 14); Whitelaw *v.* Memphis R. Co. 16 Lea, 391; Jones *v.* Florence Min. Co., 66 Wisconsin, 268 (boy of 15). In the Ohio case above, it was said, after a careful review of authorities:—

"It may be safely laid down as a general rule, supported by authority, that persons who employ children to work with or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion and care as is usual among children of the same age, under similar circumstances, and are bound to use due care, having regard to their age and inexperience, to protect them from the dangers incident to the situation in which they are placed; and as a reasonable precaution, in the exercise of such care, in that behalf, it is the duty of the employer to so instruct such employees concerning the dangers connected with their employment, which from their youth and inexperience they may not appreciate or comprehend, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom."

On the other hand, in Foner *v.* Phillips, 39 Ark. 17; 43 Am. Rep. 264, it was held to the contrary in the case of a minor of 14, the Court saying of the duty to warn: "A very anxious, careful and humane man would do that, but it is not the usual course." The Court cited Thompson on Negligence, but did not cite him far enough. This is the strongest case on the point, but its reasoning is not extended, nor satisfactory. A case sometimes cited on this side is Hickey *v.* Taafe, 105 N. Y. 26, but it is not in point, because the employee (14) "had acquired the information in fact from the best of all teachers, that of practical experience," by six weeks' work on the machine, and getting her hair caught in it. This was followed in White *v.* Letterman Lith. Co., 131 N. Y. 631 (child of 13), and in Ogley *v.* Miles, 139 N. Y. 458 (child of 16). This is the precise doctrine of Greenway *v.* Conroy, 160 Pa. St. 185; 40 Am. St. Rep. 715 (boy of 14, with six months' experience). This was also the case in Buckley *v.* Gutta Percha etc. Co. 113 N.Y. 540 (child of 12), and in addition, the accident came not from working on the machine, but from slipping, falling on it, and instinctively thrusting out a hand to recover himself. The Court said: "His injury did not come from any ignorance of the machines or of the danger to which he was exposed, but it came solely from the accident." In Crown *v.* Orr, 140 N. Y. 450, the infant was 19, and the Court said, *obiter*, that he took the risks like any other servant, which were known to him or obvious to persons of ordinary intelligence; but the decision went on the ground that the injury came from his engaging in an act for which he was not employed, at the request of a fellow servant.

At first blush, Ciriack *v.* Merchants Woolen Co. 146 Mass. 182; 4 Am. St. Rep. 307; 151 Mass. 152; 21 Am. St. Rep. 438; 6 L. R. A. 733, might seem to modify the older Massachusetts doctrine, but on scrutiny it will be seen that it does not. Here the boy was 12, and was hurt while going between machines to look for a tool, not in the regular line of his employment, but on order of his superior. There was a verdict for the plaintiff. It appeared that he had been employed in the same two months, and stress was laid on this fact, the Court observing that there was no reason to suppose that explicit instructions about the danger of touching the wheels "would have added anything to what he must fairly be presumed to have known at the time of the accident." A new trial was granted, and a second verdict was rendered for the defendant. On the new trial it appeared that the infant was of less than the ordinary intelligence, and that the place was dimly lighted. The Court remarked, that in hiring a boy of 12, of average intelligence, it is not necessary to tell him that fire will burn, or a sharp instrument will cut, or teeth of cogwheels will crush his hand, if it is put in the way. But stress was laid on the facts that the child had never been in that particular place before, was ordered there imperatively in haste, and that "he had had no instruction, and it is not clear that he had had any observation or experience which showed the danger that in getting down and looking under the machine, and getting up again, some part of his clothing might come in contact with the gearing and be caught, and draw his hand or arm between the wheels." So if on the first hearing the Court seemed to swerve from the former Massachusetts doctrine — which is by no means certain — it is apparent that they came back to it on the last. There is nothing in the later Massachusetts cases to indicate any modification of the early rule.

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In Wilson *v.* Steel Edge etc. Co., 163 Mass. 315, the danger was a circular saw, and the employee was nearly twenty-one and had previously worked with such a machine, and on the present employment had received some slight; practical instruction. In Stuart *v.* West End St. Ry. Co., 163 Mass. 391, the danger was a hay-cutting machine, but the employee was twenty years and six months old. The court evidently deemed him adult, for they said: "In the early cases the doctrine was applied in favor of boys. In favor of adults it should be applied with great caution." The same may be said of Teazer *v.* Burlington etc. R. Co. (Iowa), 61 N. W. Rep. 215, where the danger lay in a brakeman's mounting moving cars, and the employee was 19; and of Machin *v.* Alaska Ref. Co., 100 Mich. 276, where the machine was a planer, and the employee was 18; and of Crown *v.* Orr, 140 N. Y. 450, the case of a planing machine, and of a boy of 19, who had worked in front of it for three weeks; and of Williamson *v.* Sheldon Marble Co., 66 Vt. 427, where the danger was in working on a narrow, icy, slippery ledge in the mine, and the employee was nearly 16 and earned $1.15 a day (there was no proof of failure to warn, and the employee had often done the work in question); and of Evansville etc. R. Co. *v.* Henderson, 33 N. E. 1021, 134 Ind. 636, where the employee was 19 and working on a construction train; and of Herdman-Harrison & Co. *v.* Spehr, 145 Ill. 329, where the employment was oiling moving machinery, and the employee was 17, but had done the same work for eighteen months.

From this review it is apparent that (1) if the minor knows of the obvious danger from observation and experience, this is equivalent to warning and instruction; (2) that if the minor is of ordinary intelligence and nearly of adult years, he may be deemed to need no warning; (3) that otherwise he should be warned and instructed about the danger, although obvious. If the Arkansas case decides otherwise, it is the only case to our knowledge that so decides, and is inconsistent with that humanity and care which the law universally professes toward children. Certainly, up to the age of 16, children are heedless, unobservant, and reckless of danger, and it is the legal duty as well as an obligation of humanity on the part of one who employs them, to draw their attention at the outset to any danger in the situation, although it may be obvious to an adult.

The question whether warning and instruction are needed is generally regarded as one of fact.

CENSORSHIP OF THE PRESS. — The Kansas Supreme Court made a very wholesome decision, in *Re* Banks, 42 Pac. Rep. 694, that an act of the Legislature to prohibit the editing, publishing, circulating, disseminating and selling newspapers and other publications, "devoted largely to the publication of scandals, lechery, assignations, intrigues between men and women, and immoral conduct of persons," is constitutional. The Court also held that "largely" does not mean any definite amount, but it is sufficient if such items are a prominent feature and an especial characteristic. The Court said: —

"The act under consideration was not passed to prevent the publication of libels, nor to suppress papers indulging in such publications, but to prevent the publication and sale of newspapers especially devoted to the publication of scandals and accounts of lecherous and immoral conduct. Without doubt, a newspaper the most prominent feature of which is items detailing the immoral conduct of individuals, spreading out to public view an unsavory mass of corruption and moral degradation, is calculated to taint the social atmosphere, and by describing in detail the means resorted to by immoral persons to gratify their propensities, tends especially to corrupt the morals of the young, and lead them into vicious paths and immoral acts. We entertain no doubt that the Legislature has power to to suppress this class of publications, without in any manner violating the constitutional liberties of the press."

The Penal Code of New York makes it a misdemeanor to publish "any book, pamphlet, magazine, newspaper, or other printed paper devoted to the publication, and *principally made up* of criminal news, police reports or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." This was aimed at the "Police Gazette," "Day's Doings," and other similar prints. "Town Topics" would hardly come in this category, but it would be obnoxious to the Kansas statute. Some of the vilest stuff ever uttered has appeared in this fashionable and filthy sheet. It is gratifying to see an effective blow anywhere dealt at the licentious power and habits of the press, especially at a time when the press demands larger license, and in one or two States has obtained it from legislators afraid of its hostility and ridicule.

UNCHASTITY OF WITNESS. — The Supreme Court of Missouri has fallen into some trouble about the doctrine of impeaching witnesses for unchastity. In State *v.* Grant, 79 Mo. 133; State *v.* Shields, 13 Mo. 236; 53 Am. Dec. 147, it was held that a female witness might be impeached by proof of her unchaste reputation. Subsequently feeling that what is sauce for the goose is sauce for the gander, the Court applied the same rule to male witnesses. State *v.* Rider, 95 Mo. 486; 104 ib. 441. Still later they seriously disagree whether they should not restrict the sauce to the goose. State *v.* Sibley, 33 S. W. Rep. 167. The doctrine of this kind of impeach-

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ment originally arose in Com. *v.* Murphy, 14 Mass. 387, where it was announced without any expressed consideration. The reporter in a note said, "This decision has no authority to sustain it"; and it was directly and very forcibly overruled in Com. *v.* Churchill, 11 Met. 538; 45 Am. Dec. 229, "as a deviation from the established rule of the common law," and "not required by any strong considerations of fitness or expediency." The Missouri and early Massachusetts doctrine is denied in Bakeman *v.* Rose, 18 Wend. 146; Spears *v.* Forrest, 15 Vt. 435; Holland *v.* Barnes, 53 Ala. 83; 25 Am. Rep. 595; Birmingham U. Ry. Co. *v.* Hale, 90 Ala. 8; 24 Am. St. Rep. 748; Gilchrist *v.* McKee, 4 Watts, 480; 28 Am. Dec. 721; State *v.* Hobgood, 46 La. Ann.; State *v.* Eberline, 47 Kan. 155. There is some disagreement whether the impeachment should be directed to general moral character or to reputation for truth and veracity, but very little as to the doctrine that it must be aimed at general reputation and not at particular acts. The Chancellor said, in Bakeman *v.* Rose, above, that it would be better to follow the practice of some Eastern countries and shut out female witnesses altogether, than to allow their impeachment for unchastity. We agree with the editor of the New York Law Journal, that this Missouri doctrine, whether applied to women or to men, is unwise, as it also is opposed to the great preponderance of authority. Applied to women it is manifestly unjust, and as applied to men it is grotesque, for no human being's tendency to commit perjury should be inferred from the violence of her or his sexual passion. Such a rule applied to men would have shut out many of the wisest and most famous of mankind, from David and Solomon down to the present century, and even to this very decade in the very highest quarters in every Christian country. The only recognized exception to the general rule is that upon the question of consent, a prosecutrix for rape perhaps may be impeached by proof that she is reputed to be unchaste: 3 Grenl. Ev. sect. 214; People *v.* McLean, 71 Mich. 309; 15 Am. St. Rep. 263; McDermott *v.* State, 13 Ohio St. 338; 82 Am. Dec. 444; McQuirk. *v.* State, 48 Ala. 435; 5 Am. St. Rep. 381; and this has been extended to actions for *crim. con.* and prosecutions for seduction. But this was denied in State *v.* Eberline, 47 Kans. 155.

PROXIMATE CAUSE.—The most amusing case of the assertion of this doctrine is Gulf etc. Ry. Co. *v.* Shields (Texas), 29 S. W. Rep. 652. A passenger, slightly intoxicated, enters the smoking car of a railroad train and places his baggage, which is in the form of an old tow sack filled with coffee grinders, scrap iron and a jug of alcohol, on the seat beside him, projecting slightly into the aisle. The motion of the train causes the sack to tumble out into the aisle of the car, breaking the jug and spilling the alcohol on the floor. As this flows along the aisle, another passenger, who is just lighting a cigar, throws a match in the way, and the alcohol burns up to the ceiling of the car; a third passenger, with silk stockings and celluloid cuffs, has his feet, hand and eyebrows seriously scorched and sues the railroad company for damages. Held, that the contents of the sack being unknown to the conductor, and the passenger's conduct not sufficiently boisterous to warrant his ejectment, it was not *actionable* negligence unless it was a proximate cause of the injury.

BAILMENT OF HAT.—The Supreme Court of Georgia has decided a very interesting and important question concerning hats—a favorite subject of this Chairman's discourse. (He regrets that he did not learn of it in time to include it in his just now published manual on Bailments.) The majority of the Court held that the proprietor of a barber shop, kept for public patronage, is liable to a customer for the value of his hat, which was deposited on a hat-rack in the shop, and which, while the customer was being shaved, disappeared from the shop and was thus lost, such proprietor being under these circumstances a bailee for hire as to the customer's hat. The main interests of the opinion however consists in Chief-Justice Bleckley's dissenting opinion. (The Chairman is strongly opposed to the promulgation of dissenting opinions, as a rule, but makes an exception in favor of this wise and witty magistrate, who has good sense and humor enough for half a dozen average judges.) He observes:—

> "It hath never happened, from the earliest time to the present, that barbers, who are an ancient order of small craftsmen, serving their customers for a small fee, and entertaining them the while with the small gossip of the town or village, have been held responsible for mistake made by one customer whereby he taketh the hat of another from the common rack or hanging place appointed for all customers to hang their hats; this rack or place being in the same room in which customers sat to be shaved. The reason is that there is no complete bailment of the hat. The barber had no exclusive custody thereof, and the fee for shaving is too small to compensate him for keeping a servant to watch it. He himself could not watch it, and at the same time the owner. Moreover, the value of an ordinary gentleman's hat is so much, in proportion to the fee for shaving, that to make the barber an insurer against such mistakes of his customers would be unreasonable. The loss of one hat would absorb his earnings for a whole day; perhaps many days. The barber is a craftsman laboring for wages, not a capitalist conducting a business of trade or trust."

This reasoning seems effectually to take the case

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out of the rule of Deposit which the Chairman has laid down in his manual as follows: —

"The delivery need not be direct; it is sometimes implied by the bailee's coming into constructive possession in the pursuit of business beneficial to him. Thus the merchant is liable for the loss of a customer's watch and chain, taken off, and at a salesman's suggestion put in a drawer while the customer is trying on clothing, if ordinary care is not exercised toward it, but not if it is stolen. Woodruff *v.* Painter, 150 Pa. St. 91; 16 L. R. A. 451; 30 Am. St. Rep. 786. And so where a customer trying on a new cloak removes the old one and lays it on a counter, and the merchant provides no place for it, fails to notify the customer to look out for it, and makes no rules requiring employees to look out for it, he is liable if it is lost. Bunnell *v.* Stern 122 N. Y. 539; 10 L. R. A. 481. Followed in Buttman *v.* Dennett (N. Y. Com. Pl.), 9 Misc. 462, where wraps and other wearing apparel were temporarily laid off in a restaurant by a customer."

Just now it is held (Powers *v.* O'Neil, 89 Hun. 129), that a shopkeeper is not liable for the loss of a pocket-book which a customer lays upon his public counter, while trying on a hat. Speaking of barbers reminds the writer of a story recently told to him by a prominent member of the Buffalo Bar. This gentleman always walks to and from his office, and so regular is he that for several months he used to meet the same man at about the same point and the same hour. At length he missed him for a long time, but finally meeting him again, he stopped him, although he did not know him, and asked him why he had discontinued his morning walk. "Oh," said the interrogated, "that man's dead." "Dead! why what do you mean?" "Why, I am a barber, and I used to shave that man every morning while he was sick. Shaved his corpse, too!" Our friend passed on in silence, and now, he says, he minds his own business. The Chairman is in the habit of asking every barber who ministers unto him, if he knows why he has a red and white striped pole at his door. He has found but one who knew. How many of his readers know?

CIVILITY TO SERVANTS OF CORPORATIONS. — Robinson *v.* Rockland etc. Street Railway, 87 Maine, 387; 29 L. R. A. 530, is a novel case in that it recognizes the duty of passengers to be civil to the servants of carriers. The plaintiff sued for ejection from a street-car. The plaintiff, while in a car of the defendant, filled with passengers, one-half of whom were ladies, was rebuked by the conductor for the use of profane language; whereupon he called the conductor a damned liar, said he would swear as much as he damned please, and that he would be God damned if he would be put off the car; whereupon the conductor put him off. The plaintiff had a verdict of $1,187.27. Held, that even if the conductor was in error at first in charging him with profanity, he was justifiable in ejecting him for his confessed breach of the peace; and the judgment was reversed. Walters, J., said these good words: —

"We are reminded by the plaintiff's counsel that in Goddard *v.* Grand Trunk R. Co. of Canada, 57 Me. 202, 2 Am. Rep. 39, a verdict for very large damages was sustained. Certainly. And our present decision is in harmony with that decision. In that case a servant of the railroad company used exceedingly foul and profane language to a respectable and unoffending passenger. Here a passenger used very offensive and indecent language to a respectable and unoffending servant of the railroad company. We protected the passenger in that case, and for the same reason we hope to be able to protect the railroad servant in this case. Both decisions are in favor of morality and decency. In that case the servants of railroads were taught to treat passengers with civility, and in this case we hope to teach passengers to treat the servants of railroads with civility. To call a street-railroad conductor who, in a crowded car half filled with ladies, is endeavoring to maintain order and suppress profanity, a damned liar, is a poor foundation on which to rest a suit for punitive damages."

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The Green Bag.

PUBLISHED MONTHLY, AT $4.00 PER ANNUM. SINGLE NUMBERS, 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor,
HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

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

THE GREEN BAG.

Editor of the Green Bag.

Perhaps it is cheeky for a layman to offer advice to lawyers on legal matters, but you see, the layman, being the sufferer by the law, is more interested in dodging it than the lawyer is.

Now I take it that there is no necessity for wasting your space in illustrating what an instrument of rascality the mechanic's lien law has become, in its giving parties, second to the contractor, the right to file liens against a building, without any reasonable method being provided or allowed whereby the owner could ascertain when he was safe in paying his contractor. These rascalities must be known to all lawyers who have a mechanic's lien law in their State.

But certain and perfect relief has been granted the man who wishes to build a house and don't like paying the same bill twice, through recent decisions of the Supreme Court of Pennsylvania, the morphology of which seems to be about this: A certain owner provided in his contract with the contractor for the house he was building, that no mechanic's liens should be filed by anybody against that house or ground. A sub-contractor filed a lien, and finally it came before the Supreme Court. Of course the sub-contractor blathered about "anybody else signing away my rights!" (at least I reckon he did — all of them do that), but the Court wouldn't have it that way, and said that the second-hand man could not have any rights in the matter except those that came to him through the man-in-chief, and that man-in-chief, having signed away his rights to file the lien, no such rights remained anywhere for anybody, and be that good or bad "law," it's the sort of plain sense that any man can see. Then a lot of fellows in Philadelphia, calling themselves "The Builders' Exchange," or some such title, kicked up a great dust; they flooded the State with dodgers about this "unjust decision," and got the Legislature to pass an act nullifying it, and there's where they broke their own necks. The Supreme Court isn't used to being sat down on in that style, and it promptly held this nullification no good, as contravening the provision of the United States Constitution that no State could pass an act impairing the force of contracts. There you see where the virtuous "builders" got themselves into a deadly scrape, by arraying the force of the United States Constitution against them, when they only had the State of Pennsylvania up to that time.

Before and after the enactment of this nullification, there were some more cases in the Supreme Court, and because the decisions of that Court didn't jump the way the lawyers *thought* they would, they — the lawyers — assified themselves by saying the Court was contradictory. Now "A Disgusted Layman" naturally likes to see a Court assify itself, but this time the laugh was on the lawyers, not on the Court; and soberly speaking, I have never met a more striking illustration of how lawyers will persist in setting their ideas of "The Law" above the purposes for which law exists, than just here: A party had a clause in a contract with a builder about like, "This building shall be delivered free of mechanics' liens," and the Court said that that didn't prevent sub-contractors from filing and enforcing liens, that it was only a bargain as to there being no liens on the building when the contractor delivered it, and didn't bar out the *filing* of liens. Now, despite all the lawyers in America, this position of the Court seems as clear as a hole in a ladder. The wording of that contract might have meant one thing or might have meant another; it certainly was not free from any ambiguity; and whether it is or isn't *law*, it's common sense that, when a man signs away a right he has under the law, there must be no room for dodging about what he meant; the language must be capable of no double meanings. Well, there the whole business stands, as a layman sees it, and now for the advice this state of affairs gives to lawyers. Now I'm not saying that I've got that all down to a dot, I may have missed dotting several i's and crossing some t's, but I *know* that I've given about the full size of it for all practical purposes. So it seems to me that there wasn't any particular *law* about this business; it wasn't a matter of statute or even common law, it was only the Court interpreting and applying certain deeply fixed principles of the United States Constitution to certain facts. Surely it must be that the Supreme Court of Pennsylvania was right in its decisions, for they are the plainest requirements of ordinary good sense, and follow as matters of necessity from the premises. Therefore, as the whole business rests on an interpretation of the United States Constitution, the law of the decisions should be as good in New York or Wisconsin as it is in Pennsylvania, and what lawyers should do is to inform any client who has bought property, thereby evincing insanity, or is building a house, which is the medical term for being incurable (that's Sam Weller, isn't it?), that incorporating such a provision in the contract between him and his builder ought to make him safe, and if some second-hand man tries to support his lien, take it up to the Supreme Court of your State and see if you don't knock second-hand out. If this course is resorted to, it will be but a few years until lien laws are dead letters everywhere.

The great lawyer of the district your "Disgusted Layman" lives in recently afforded a strong evidence of how

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lawyers set abstractions of law above the purposes of law. Speaking of the Limited Partnership Law, he said that no association could be formed under it that he couldn't knock into a cocked hat. Now just stop and think what such a declaration means! It is unquestionable that the Act referred to is the very plainest and simplest in its requirements of any on any statute books. Any intelligent man who studies it with the intent to honestly comply with its requirements, can know exactly what to do under it, to secure the exemption from personal liability it provides for. Therefore, if the simplest and most self-evident in purpose of all the statutes on the books can be knocked to pieces by an expert lawyer, what in thunder is the use of law? Why not let the lawyers do it all, and save the expense of legislatures? Rats! I know that many old lawyers will agree with the one I refer to, but all the same, it's all rot and rubbish, for if law is an inscrutable ogre, why, the sooner we stamp it out the better for us.

YOUR DISGUSTED LAYMAN.

LEGAL ANTIQUITIES.

WHEN the practice of advocacy, hired or voluntary, was first introduced into England, it is impossible to determine. That advocates were known in the Curia Regis under certain terms and conditions there seems to be no doubt; but in regard to any definite period when they may be said to have been established, the first official recognition of the counsel or advocate authorized to represent his client in court is to be found in the third year of King Edward I, when it was declared that "if any sergeant-counter do any deceit or beguile the court, he shall be imprisoned for a year and a day, and from henceforth not be heard to plead in the court for any man."

FACETIAE.

THE prosecuting attorney of a North Missouri county and a young attorney noted for his persistence were recently trying the preliminary hearing of a criminal case before a justice of the peace. The young attorney asked many irrelevant and incompetent questions, and when the prosecuting attorney would object would always say: —

"Your honor, before you pass on that objection I want to argue it."

Finally the young man asked the same question the seventh time against the prosecuting attorney's objection, when the prosecutor, losing his patience, said in a loud aside: —

"——, are you never going to get over being a confounded fool?"

Whereupon the young fellow jumped up with his usual remark: —

"Your honor, before you pass on that I want to argue it."

JUDGE GARY has a dry wit with him that is occasionally the cause of his grim court-room being pervaded by a very audible tittering.

The other day one of the attorneys was airing his indignation. He had been robbed. Yes, sir, robbed. It was shameful the way things went right there under the eyes of the law.

Finally Judge Gary noticed the fuming and fretting one.

"What's the matter now?" he asked.

"Matter? It's a confounded outrage. Had my overcoat stolen right from this room."

The Judge smiled a little.

"Overcoat, eh?" he said. "Pah, that's nothing. Whole suits are lost here every day.

SOME years ago a lawyer at Chillicothe, Mo., a son of the Emerald Isle with the wit characteristic of his country, received a collection from Iowa against a man who had been dead for some time. He returned the collection with the following advice: —

"——, is dead and in h—l, and as Iowa is nearer that place than Missouri you had better bring suit in Iowa."

THE following description in a deed on record at Centerville, Mich., is worthy of preservation if not of imitation: —

"Commencing at the center of the north bridge on east road at the foot of sand hill so called, thence easterly up the centre of the creek as far as dry land goes, thence northerly along an old ditch, the exact line being hereafter to be determined by a row of stones and stakes to be set and stuck to the Michigan Air Line Rail Road, thence westerly to where an old road used to run, thence southerly to place of beginning."

NOTES.

"I LEAVE behind me," wrote Lord Campbell, "thirteen huge volumes (XV to XVIII of Adolphus and Ellis, and I to IX of Ellis and Black-

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burn) of Queen's Bench Reports, chiefly filled with my judgments while I presided in the Queen's Bench. But from the portentous multiplicity of law reports now published, there seems almost a certainty of all the judgments of every judge, however eminent, being speedily smothered. The whole world is now insufficient to contain all the law reports which are published. I remember the time when one good-sized book-case would hold all the books worth consulting. What is the remedy? Perhaps a decennial *auto-da-fé*."

Lord Campbell would to-day probably recommend an *annual auto-da-fé*. Certainly one-half the cases now reported might much more fittingly be consigned to the flames than preserved in type.

LORD CHIEF-JUSTICE ERLE was prone to interrupt counsel when it was found that the judges had already made up their minds against him. On one occasion Mr. Bovill, Q. C., soon afterwards made a judge, was stopped with: "Here we stand, we four men, and we have all firmly (emphasizing the adverb) made up our minds that there must be a new trial; but if you think it worth your while going on after that (playfully), why of course we 'll keep on hearing you." Whereupon the Q. C. laughingly sat down.

On another occasion he again interrupted with "I beg to inform the counsel 'there is a time in the mind of every man at which he lets down the flood-gates of his understanding, and allows not one more drop to enter'; and that time in my mind has fully arrived."

A TABLET once placed in a New York court-room to the memory of John Sloss Hobart, a supreme judge of New York, contained a sarcasm on the age disqualification of the Constitution, in, after reciting his retirement on that account, recording that for seven years following he served, and to his death, as Federal district judge.

"I KNOW of no such thing as genius," said Hogarth; "genius is nothing but labor and diligence."

LITERARY NOTICES.

MR. MURAT HALSTED has an article in McCLURE'S MAGAZINE for February, giving the secret history of the nomination and administration of President Garfield and embodying important conversations with Garfield never before published, one of them held only a few hours before his assassination. A series of portraits of Garfield accompanies the article.

THE Venezuelan Commission, as it meets for its business sessions in Washington, is a dignified and prepossessing body of men. A photograph of the group has been made for the frontispiece of the February REVIEW of REVIEWS. Each of the five portraits is a speaking likeness.

AN interesting reminder that the Behring Sea question should not be lost sight of in the discussion of the Venezuelan boundary is furnished in a paper, by Henry Loomis Nelson, on "The Passing of the Fur-Seal," in the February HARPER'S. This article is a history of the indiscriminate killing of American seals by Canadian hunters, and the neglect of the British Government to abide by the decision of the Paris Tribunal.

THE installment of Mr. David A. Wells's "Principles of Taxation," in APPLETON'S POPULAR SCIENCE MONTHLY for February, contains descriptions of the tax systems of China and Japan, and shows that, although taxation has prompted many of the most dramatic incidents and important movements of history, only two or three works have been devoted to this subject, and hardly any use has been made of it in literature.

THE contributions in the February ATLANTIC which will attract perhaps the widest attention is an able paper entitled "The Presidency and Mr. Reed." It is a thoughtful presentation of the requirements of the presidential office and a discussion of Mr. Reed's fitness for it. It is the first of a promised series upon the issues and some of the personalities of the forthcoming campaign.

THE tenth installment of President Andrews' history in SCRIBNER'S MAGAZINE for February, is called "The Neo-Republican Ascendency," which describes the close of Cleveland's first administration, the campaign of 1888 and Harrison's victory. Other topics are the Billion Dollar Congress, the McKinley Bill, the Johnstown Flood and the lynching of Italians in New Orleans. The illustrations are made from contemporary photographs and are very realistic.

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"THE Life of Napoleon" is occupied in the February CENTURY with Napoleon as the Western Emperor, and covers the events of Friedland, Tilsit, the meeting with Queen Louisa of Prussia, and the splendors of Paris and the unification of France. It is one of the most beautifully illustrated installments of the history that has yet appeared. It includes among other pictures Meissonier's "Marshal Ney" and "Friedland," and Detaillé's "Vive l'Empereur."

"THE Anglo-American Imbroglio" serves as the caption under which two most important articles open the February number of the NORTH AMERICAN REVIEW. The first is entitled "The Venezuelan Difficulty," by Andrew Carnegie, and the second "The British Feeling," by the Right Hon. James Bryce, the distinguished author of "The American Commonwealth." These two articles, from so eminent sources, characteristically describe the sentiment pervading England and America respectively over the subject of the boundary dispute between the former country and the South American republic.

BOOK NOTICES.

LAW.

THE PRINCIPLES OF THE AMERICAN LAW OF BAILMENTS. By JOHN D. LAWSON, LL.D. The F. H. Thomas Law Book Co., St. Louis, 1895. Law sheep.

This is a companion volume to Mr. Lawson's well-known work on Contracts.. The author, rejecting the old classification of bailments, makes of them *two* classes only — the *ordinary* and the *exceptional* bailment. The subject is very fully and exhaustively covered, and the work is excellently adapted to the needs of the practitioner. The student also will find it a valuable aid.

AMERICAN ELECTRICAL CASES. Being a collection of all the important cases (excepting Patent Cases) decided in the State and Federal Courts of the United States from 1870, on subjects relating to the Telegraph, the Telephone, Electric Light and Power, Electric Railway, and all other practical uses of Electricity, with Annotations. Edited by WILLIAM W. MORRILL. Vol. IV (1892–1894). Matthew Bender, Albany, N. Y. 1895. Law sheep. $6.00.

One hundred and thirty-eight cases are reported in full in this volume, while as many more are referred to in the notes. This series is now brought well down to date, and covers all cases of importance decided since 1873. To all lawyers and corporations at all interested in the subject the "Cases" should be indispensable.

ELEMENTS OF DAMAGES. A handbook for the use of students and practitioners. By ARTHUR G. SEDGWICK. Little, Brown & Co., Boston, 1896. Law sheep, $3.00 *net*; cloth, $2.50 *net*.

This work must not be confounded with the elaborate treatise on the same subject by *Theodore* Sedgwick. The present volume is a review, in a compact form, of the law of Damages, and a statement of its principles in the form of rules or propositions of law, such as a judge might lay down to jury. These principles are illustrated by the cases from which they are drawn. The author has succeeded in adequately treating the subject within the limits of a moderate sized volume. Students, and lawyers as well, will find it a very useful book.

MISCELLANEOUS.

THE CABELLS AND THEIR KIN. A memorial volume of History, Biography, and Genealogy. By ALEXANDER BROWN, D. C. L. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $7.50.

Among the many prominent Virginia families none can lay claim to greater distinction than the Cabells; the descendants of the founder, Dr. William Cabell, include many of the most prominent men of our country. This work of Mr. Brown's will of course be of especial interest to Virginians, but it contains much information which will appeal to all students of history. The author has devoted much time and research to the preparation of this book, and has gathered together much valuable material which would otherwise inevitably have been lost. We quite agree with Mr. Brown that it is our sacred duty to "gather up the fragments that remain" before the past history of our forefathers has been obliterated by the effacing fingers of destruction and decay. Such a work as this merits the appreciation not only of the family immediately concerned, but of all who have a love and pride of country. Many interesting portraits illustrate the book.

BOOKS RECEIVED.

A SELECTION OF LEADING CASES IN THE COMMON LAW. With Notes. By WALTER SHIRLEY SHIRLEY. Fifth Edition. By RICHARD WATSON, LL.B., of Lincoln's Inn. Stevens & Sons, Limited, London, 1896. Cloth.

THE GENERAL PRINCIPLES OF THE AMERICAN LAW OF THE SALE OF GOODS. By REUBEN M. BENJAMIN. The Bowen-Merrill Co., Indianapolis, 1896. Law sheep.

THE WOMAN'S MANUAL OF PARLIAMENTARY LAW. By HARRIETTE R. SHATTUCK. Lee & Shepard, Boston, 1896. Cloth.

AMERICAN STATE REPORTS. Vol. 46. Bancroft-Whitney Co., San Francisco. Law sheep.

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The Green Bag.

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RICHARD RIKER.

By Irving Browne.

RICHARD RIKER was born in Newtown, Long Island, in 1774. His ancestors, who were Germans, had settled there about 1632. His father, Samuel Riker, fought in the Revolutionary War, and his brother Andrew commanded the "Saratoga" and the "Yorktown" in the war of 1812. One of his sisters married Dr. Macnevin of New York, and another Thomas Addis Emmet. Richard was educated to the law, was district attorney of New York in 1802, deputy attorney-general of the State in 1803, and in 1815 was elected recorder of the city, which office he held, excepting two years, until 1839. The office of recorder had been held by Robert R. Livingston, Samuel Jones, James Kent, Ogden Hoffman, and has been held since by John T. Hoffman, John K. Hackett, and others of distinction. Riker died in 1842.

Riker was a man of commonplace talents, but was eminently respectable. His remains are few, and not especially interesting, but he undoubtedly was an excellent magistrate, learned in the criminal law, of wide experience, of unwearying patience, of good nature and keen sympathies, and thus in his place a highly useful citizen. He was a gentleman of the old school — of the curled and ruffled Corinthian order — at a period when there was time for dignity, deliberation and courtesy, and when these qualities went a long way. Compared with Livingston, Jones, Kent, and Ogden Hoffman, his abilities were not shining, and yet in the provincial town in which he flourished he made a prominent figure, respected and probably beloved by all, and a very evident object for the gentle satire of a merry poet.

Some complimentary allusions were made to Mansfield by Pope and Cowper in their verse, but such things are rare, and it does not often fall to the lot of a lawyer to form the exclusive subject of a poem by a celebrated poet. Only two instances occur to the writer. Shelley handed down Lord Chancellor Eldon to a very unpleasant immortality in some verses denouncing him for having deprived him of his children because the poet was an atheist. He refers to the court of chancery and the chancellor as

> "the earth-consuming hell
> Of which thou art the demon,"

and calls the chancellor

> "darkest crest
> Of that foul, knotted, many-headed worm,
> Which rends our mother's bosom,"

and speaks of his "most killing sneer," and "the acts and snares of thy black den," and charges that he can "outweep the crocodile," and that his "false tears" are "millstones, braining men." Probably this did not disturb the chancellor much, but perhaps the verses will outlive his fame; and at all events, a bust of the poet has just been erected in Oxford, from which he was expelled for his atheism, and no attention of this kind has been bestowed on the chancellor, who after all was a greater "doubter" than Shelley.

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The only other instance of such a poem to my knowledge, is one addressed to the subject of this sketch by Fitz-Greene Halleck, and although it is merrily satirical, the Recorder had no reason to complain of it, for it forms his only passport to immortality on earth. It is one of the series called "The Croakers," written by Halleck and Joseph Rodman Drake, mostly under the pseudonymn of "Croaker," and published in the "New York Evening Post" previous to 1828. The poems are on social and political topics of local interest, and are filled with merry banter, sharp satire, and personalities both good humored and biting. They are marked by grace, wit, vigor and imagination, and contain some of the finest serious passages in American poetry. Among the most famous is the apostrophe to the "American Flag," by Drake, the concluding and best stanza of which, however, beginning, "Forever float that standard sheet," was written by Halleck in place of a very tame one by Drake. "The Recorder" is known of course to the oldest members of our profession, but probably only to them, for Halleck has gone rather out of fashion; even "Marco Bozarris" is no longer spouted by schoolboys nor embraced in school-readers, and the poet will chiefly be known to posterity by a few bones piously preserved in one of those mausoleums known as general collections of poetry, which are mainly used for pressing leaves and mislaying papers in. It may be interesting therefore to have this beautiful poem reproduced in these columns as a whole, with some explanatory notes, and I make no excuse for such a pious office at once to the poet and to the lawyer.

THE RECORDER.— A POETICAL EPISTLE.

By Thomas Castaly.

"On they move
In perfect phalanx to the Dorian mood
Of flutes and soft Recorders."— Milton.

"Lived in Settles numbers one day more!"— Pope.

My dear Dick Riker, you and I
Have floated down life's stream together,
And kept unharmed our friendship's tie,
Through every change of fortune's sky,
Her pleasant and her rainy weather.
Full sixty times since first we met,
Our birthday suns have risen and set,[1]
And time has worn the baldness now
Of Julius Cæsar on your brow;
Your brow — like his, a field of thought,
With broad, deep furrows, spirit-wrought,
Whose laurel harvests long have shown
As green and glorious as his own;
And proudly would the *Cæsar* claim
Companionship with *Riker's* name,
His peer in forehead and in fame.
Both eloquent and learned and brave,
Born to command and skilled to rule,
One made the citizen a slave,
The other makes him more — a fool.
The Cæsar an imperial crown,
His slaves' mad gift, refused to wear;
The Riker put his fool's cap on,
And found it fitted to a hair.
The Cæsar, though by birth and breeding.
Travel, the ladies, and light reading,
A gentleman in mien and mind,
And fond of Romans and their mothers.
Was heartless as the Arab's wind,
And slew some millions of mankind,
Including enemies and others.
The Riker, like Bob Acres, stood
Edgeways upon a field of blood,
The where and wherefore Swartwout knows,
Pulled trigger, as a brave man should,
And shot, God bless them — his own toes.[2]
The Cæsar passed the Rubicon
With helm and shield and breastplate on,
Dashing his war-horse through the waters;
The Riker would have built a barge
Or steamboat, at the city's charge,
And passed it with his wife and daughters.
But let that pass. As I have said,
There's naught, save laurels, on your head,
And time has changed my clustering hair,
And showered the snowflakes thickly there,
And though our lives have ever been
As different as their different scene;
Mine more renowned for rhymes than riches,
Yours less for scholarship than speeches;

[1] This was an impudent fabrication, for the poet was only thirty eight-years old, and the Recorder was sixteen years older.

[2] The Swartwout duel arose from a political quarrel, Riker being an adherent of De Witt Clinton, and Swartwout an ardent friend of Col. Burr.

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Mine passed in low-roofed leafy bower,
Yours in high halls of pomp and power,
Yet are we, be the moral told,
Alike in one thing — growing old;
Ripened like summer's cradled sheaf,
Faded like Autumn's falling leaf —
And nearing, sail and signal spread,
The quiet anchorage of the dead:
For such is human life, wherever
 The voyage of its bark may be,
On home's green-banked and gentle river,
 Or the world's shoreless, sleepless sea.

Yes, you have floated down the tide
Of time, a *Swan* in grace and pride
And majesty and beauty, till
The law, the Ariel of your will,
 Power's best beloved, the law of libel
(A bright link in the feudal chain),
Expounded, settled, and made plain,
 By your own charge, the Juror's Bible,
Has clipped the venomed tongue of Slander,
That dared to call you "Party's Gander,
The leader of the geese who make
 Our city's parks and ponds their home,
And keep her liberties awake
 By cackling, as their sires saved Rome.
Gander of Party's pond, wherein
Lizard, and toad, and terrapin,
Your ale-house patriots, are seen,
 In Faction's feverish sunshine basking."
And now, to rend this veil of lies,
Word-woven by your enemies,
And keep your sainted memory free,
From tarnish with posterity,
 I take the liberty of asking
Permission, sir, to write your life,
With all its scenes of calm and strife,
 And all its turnings and its windings,
A poem in a quarto volume,
Verse like the subject, blank and solemn,
 With elegant appropriate bindings,
Of rat and mole skin the one half,
The other a part fox, part calf.
Your portrait graven line for line,
From that immortal bust in plaster,
The masterpiece of Art's great Master,
 Mr. Praxiteles Browere,
Whose trowel is a thing divine,
Shall smile and bow, and promise there,
And twenty-nine fine forms and faces,
 The Corporation and the Mayor,
Linked hand in hand, like Loves and Graces,
 Shall hover o'er it grouped in air
With wild pictorial dance and song;
 The song of happy bees in bowers,
 The dance of Guido's graceful hours,
 All scattering Flushing's garden flowers
Round the dear head they loved so long.

I know that you are modest, know
 That when you hear your merit's praise,
Your cheek's quick blushes come and go,
Lily and rose-leaf, sun and snow,
 Like maidens' on their bridal days.
I know that you would fain decline
To aid me and the sacred nine,
In giving to the asking Earth,
The story of your wit and worth;
For if there be a fault to cloud
 The brightness of your clear good sense,
It is, and be the fact allowed,
 Your only failing — Diffidence!
An amiable weakness — given
 To justify the sad reflection,
That in this vale of tears not even
 A Riker is complete perfection.
A most romantic detestation
Of power and place, of pay and ration;
A strange unwillingness to carry
 The weight of honor on your shoulders,
For which you have been named, the very
 Sensitive plant of office holders.
A shrinking bashfulness, whose grace
Gives beauty to your manly face.
Thus shades the green and glowing vine
The rough bark of the mountain pine,
Thus round her Freedom's waking steel
 Harmonious wreathed his country's myrtle;
And thus the golden lemon's peel
 Gives fragrance to a bowl of turtle.

True "many a flower," the poet sings,
 "Is born to blush unseen,"
But you, although you blush, are not
 The flower the poets mean.
In vain you wooed a lowlier lot,
 In vain you clipt your eagle-wings;
Talents like yours are not forgot
 And buried with Earth's common things.
No! my dear Riker, I would give
My laurels, living and to live,
Or as much cash as you could raise on
Their value, by hypothecation,
To be for one enchanted hour,
In beauty, majesty and power,
What you for forty years have been,
The Oberon of life's fairy scene!

An anxious city sought and found you
 In a blest day of joy and pride,

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Sceptered your jeweled hand, and crowned you
Her chief, her guardian and her guide.
Honors which weaker minds had wrought
In vain for years and knelt and prayed for,
Are all your own, unpriced unbought,
Or (which is the same thing) unpaid for.
Painfully great! against your will
Her hundred offices to hold,
Each chair with dignity to fill,
And your own pockets, with her gold.
A sort of double duty, making
Your task a serious undertaking.

With what delight the eyes of all
Gaze on you, seated in your Hall,
Like Sancho in his island reigning,
Lord leader of its motley hosts
Of lawyers and their bills of costs,
And all things thereto appertaining,
Such as crimes, constables and juries,
Male pilferers and female furies,
The police and the *Pollissons*,
Illegal right and legal wrong.
Bribes, perjuries, law-craft and cunning,
Judicial drollery and punning;
And all the *et ceteras* that grace
That genteel, gentlemanly place!
Or in the Council Chamber standing,
With eloquence of eye and brow,
Your voice the music of commanding,
And fascination in your bow,
Arranging for the civic shows
Your "men in buckram," as per list,
Your John Does and your Richard Roes,
Those Dummys of your games of whist.
The Council Chamber — where authority
Consists in two words — a majority.
For whose contractors' jobs we pay
Our last dear sixpences for taxes,
As freely as in Sylla's day
Rome bled beneath his lictor's axes.
Where on each magisterial nose
In colors of the rainbow linger,
Like sunset hues on Alpine snows,
The printmarks of your thumb and finger.
Where he, the wisest of wise fowl,
Bird of Jove's blue-eyed maid — the owl,
That feathered alderman, is heard
Nightly, by poet's ear alone,
To others' eyes and ears unknown,
Cheering your every look and word,
And making, room and gallery through,
The loud, applauding echoes peal,
Of his "Où peut-on être mieux
Qu'au sein de sa famille."
Oh! for a Herald's skill to rank
Your titles in their due degrees!
At Sing Sing, at the Tradesman's Bank,
In courts, committees, caucuses;
At Albany, where those who know
The last year's secrets of the Great,
Call you the golden handle to
The earthen Pitcher of the State.
(Poor Pitcher![3] that Van Buren ceases
To want its service gives me pain,
'Twill break into as many pieces
As Kitty's of Coleraine.[4])
At Bellevue, on her banquet night,
Where Burgundy and business meet,
On others, at the heart's delight,
The Pewter Mug in Frankfort Street,
From Harlem bridge to Whitehall dock,
From Bloomingdale to Blackwell's isles,
Forming, including road and rock,
A city of some twelve square miles,
O'er street and alley, square and block,
Towers, temples, telegraphs and tiles,
O'er wharves whose stone and timbers mock
The ocean's and its navies' shock,
O'er all the fleets that float before her,
O'er all their banners waving o'er her,
Her sky and waters, earth and air —
You are Lord, for who is her Lord Mayor?
Where is he? Echo answers, where?
And voices like the sound of seas
Breathe in sad chorus, on the breeze,
The Highland mourner's melody —
Oh Hone[5] a rie! Oh Hone a rie!
The hymn o'er happy days departed,
The hope that such again may be,
When power was large and liberal hearted,
And wealth was hospitality.

One more request, and I am lost
If you its earnest prayer deny,
It is that you preserve the most
Inviolable secrecy

[3] Nathaniel Pitcher was elected lieutenant-governor in 1826, when De Witt Clinton was elected governor, and by the death of Clinton he became acting governor. He expected to be nominated for lieutenant-governor in 1828, when Van Buren was elected governor, and not having received the nomination he broke with his party.

[4] This reference is to an old Irish song about a maid who was so startled at the sudden appearing of her lover that she dropped and broke her pitcher. He soothed her after the fashion of lovers, and after that, "The devil a pitcher was whole in Coleraine." Mr. Abbey included the song in his illustrated volume of "Old Songs."

[5] Philip Hone was a prominent citizen, and had been mayor, and was naval officer at the time of hisdeath, in 1851.

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As to my plan. Our fourteen wards
Contain some thirty-seven bards,
Who, if my glorious theme were known,
Would make it, thought and word, their own,
My hopes and happiness destroy,
And trample with a rival's joy
Upon the grave of my renown.
My younger brothers in the art,
Whose study is the human heart —
Minstrels, before whose spells have bowed
The learned, the lovely and the proud —
Ere their life's morning hours are gone
Free minds be theirs, the Muses' boon,
And may their suns blaze bright at noon,
And set without a cloud.

Hillhouse, whose music like his themes
Lifts earth to Heaven — whose poet-dreams
Are pure and holy as the hymn
Echoed from harps of seraphim,
By bards that drank at Zion's fountains
When glory, peace and hope were hers,
And beautiful upon her mountains
The feet of angel messengers.
Bryant,[6] whose songs are thoughts that bless
The heart, its teachers, and its joy,
As mothers blend with their caress
Lessons of truth and gentleness
And virtue for the listening boy.
Spring's lovelier flowers for many a day
Have blossomed on his wandering way —
Being of beauty and decay,
They slumber in their autumn tomb;
But those that graced his own Green River
And wreathed the lattice of his home,
Charmed by his song from mortal doom.

[6] Bryant was not above the reach of flattery, and succumbed to the compliment here bestowed — the most exquisite ever paid by one poet to another. He prefaced this poem in the Post as follows: "There is a wonderful freshness and youthfulness of imagination in the following epistle, for a septuagenarian if not an octogenarian poet, as the writer must be, if we are to judge from the chronology of his initial lines. He has lost nothing of the grace and playfulness which might have belonged to his best years. The sportive irony of the piece will amuse our readers and offend nobody. Indeed, we are not sure but a part of this is directed against ourselves, but as Mr. Castaly has chosen to cover it up in dashes, it might imply too great a jealousy of our dignity to make the application, and to mutilate the poem by omitting any part is contrary to the strict charge of the writer, who insists upon our publishing the whole or none." One can imagine the satisfied smile that crept over Bryant's severe face in reading the elder poet's compliment. After that "The Croakers" were free to say anything in The Post that they had omitted to say before.

Bloom on, and will bloom on forever.
And Halleck — who has made thy roof,
St. Tammany! oblivion-proof—
Thy beer illustrious, and thee
A belted knight of chivalry;
And changed thy dome of painted bricks,
And porter casks, and politics,
Into a green Arcadian vale,
With Stephen Allen[7] for its lark,
Ben Bailey's voice its watchdog's bark,
And John Targee its nightingale.

These, and the other thirty-four,
Will live a thousand years or more —
If the world lasts so long. For me,
I rhyme not for posterity,
Though pleasant to my heirs might be
The incense of its praise,
When I, their ancestor, have gone
And paid the debt, the only one
A poet ever pays.
But many are my years, and few
Are left me ere night's holy dew,
And sorrow's holier tears, will keep
The grass green where in death I sleep.
And when that grass is green above me,
And those who bless me now and love me
Are sleeping by my side,
Will it avail me aught that men
Tell to the world with lip and pen
That once I lived and died?
No — if a garland for my brow
Is growing, let me have it now,
While I'm alive to wear it;
And if, in whispering my name,
There's music in the voice of fame,
Like Garcia's, let me hear it!

The Christmas holidays are nigh,
Therefore, till New Year's Eve, good-bye,
Then *revenons à nos moutons*,
Yourself and Aldermen — meanwhile,
Look o'er this letter with a smile;
And keep the secret of its song
As faithfully, but not as long,
As you have guarded from the eyes
Of editorial Paul Prys,
And other meddling, murmuring claimants,
Those Eleusinian mysteries,
The City's cash receipts and payments.

Yours ever,
T. C.

[7] Stephen Allen had been mayor, state senator, and sub-treasurer. At the age of eighty he was one of the victims in the burning of the steamboat "Henry Clay," in 1852.

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Riker's preaching was better than his practice in respect to dueling. Jacob Barker, the famous broker, was indicted for sending a challenge to fight a duel, and he defended himself in proper person before the Recorder. (7 Wheeler's Crim. Cas. 19.) The jury convicted him, and the Recorder, in passing sentence of disqualification from holding office, held the punishment constitutional, and piously observed: "We feel constrained also to pronounce one word of reprobation on the direful practice of dueling, to which the defendant himself assented most fully in his argument. It is a practice most abhorrent to reason, to humanity, and to religion. By it many of our best citizens have been destroyed — many a worthy family rendered miserable. We are bound by every sanction to lend our aid to extinguish it." This was in 1822. The Recorder had probably gained wisdom from his own disastrous fortune in dueling. In a duel between De Witt Clinton and Colonel John Swartwout he had been second to Clinton; and in 1803, at Hoboken, near the ground where Hamilton subsequently fell, he had a meeting with Robert Swartwout, brother of the Colonel, was severely wounded in the leg just above the ankle, and was confined to the house seven months. He saved his leg from amputation by his obstinacy. It is said that Hamilton interposed to prevent any prosecution of Riker for this offense, and that he frequently visited him at his house in Wall street, near the old Custom House. Riker should have had the poet up for contempt of court in this, for it was a gross libel not only on his marksmanship, but on his courage, because not only was he as bald, but he was "as brave as Julius Cæsar," as the poet himself admits in another part of the poem. He distinguished himself in several riots in the city by his bodily courage and presence of mind, and was largely influential in suppressing the disorder. Dueling, although illegal, was common among lawyers in Riker's day. Benjamin D. Silliman, in his address at a dinner given him by the New York and Brooklyn Bar, in 1889, said: "Two at least of the learned judges in this city, then on the bench, had been wounded in duels. Three other members of the Bar occur to me at this moment who had been so unfortunate as to kill their adversaries, and others had been engaged in such affairs." It is highly probable that in the days when "the code" prevailed, lawyers were less lavish in severe epithets and allusion toward one another than now. Mr. Silliman says, "there was much more of stateliness, reserve, and formality than prevails at this day." The death of Hamilton ended the murderous custom in New York, and the Code of Honor gave place to the Code of Procedure.

Of the engraved portraits of the Recorder a reproduction of one accompanies this sketch. It was engraved for a volume published by the City of New York commemorating the celebration on the opening of the Erie Canal, which is a scarce book. Another interesting engraving is from Browere's bust, a photographic copy of which was sent in 1863 to Halleck, who responded: "The photograph, as you observe, does not do the Recorder justice, for although showing successfully his remarkably fine forehead, it gives us no idea of the play of his features, which, as you doubtless remember, were in their expression, when lit up by a merry thought or an impulse of manly courtesy, as fascinating as his characteristic bow." The memorial volume gives "Mr. Praxiteles Browere" a grand puff in its description of this engraving: "This original bust is an excellent specimen of the new art of making genuine facsimiles from the living subject. . . No painting or modeling can equal it in giving the true form and expression of the countenance; willful ignorance, or something worse, can alone object to this valuable discovery; the multitude of those of the highest rank who have un-

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dergone the operation are sufficient witnesses to its not being executed with any painful or disagreeable circumstances to the subject." Browere's method consisted in taking a plaster cast from life. He nearly killed Thomas Jefferson in the operation, but fortunately sacrificed his cast rather than the President.

The same volume contains a facsimile of a letter addressed on behalf of the corporation by the Recorder and others to Adams, Jefferson and Carroll, the three surviving signers of the Declaration of Independence, accompanying gold medals struck by the city on the opening of the canal. The facsimile appended to the other portrait is from his signature on the title-page of a book of "Poems by St. John Honeywood, A.M., with some Pieces in Prose," dedicated to Josiah Ogden Hoffman by the editor in "gratitude for his patronage of its publication." Honeywood was a lawyer, born in 1763, died in 1798, settled at Salem, N. Y., and was one of the electors who chose John Adams for President. His poems celebrate Washington's declination of a third term of the Presidency, and describe Shay's rebellion. Riker's signature is of the John Hancock order, and although he did not risk so much as the Signer by making it, yet doubtless if the occasion had demanded he would have done so, and proved worthy of the Roman toga in which he is portrayed.

"The Croakers" is a source of a great deal of information on the social and political history of the times. Here one learns that a lottery was resorted to for the purpose of building the almshouse in the city of New York, and here one is reminded (or learns) that more than $72,000 was raised for building the Erie Canal by a tax on travelers by steamboat. "The Croakers" denounced Surveyor-General De Witt for the Latin and Greek names attached to new towns in western New York, dubbing him "godfather of the christened West," but Mr. Curtis, in the "Easy Chair," pointed out that this was a gross injustice. Here one can learn about all the distinguished men and popular resorts, and the business people of the little city. New York at that time was but a large village, where everybody knew everybody and gossiped about everybody. The town hardly extended above Canal Street. The Battery was the favorite promenade, and the City Hall Park answered to the present Central Park. Niblo's Garden was then in vogue, Cato Alexander kept a tavern, the resort of sporting men, four miles out, and Hoboken Meadows was a day's journey for picnic parties. The chief banks were the Franklin and the Tradesmen's, and the great bankers were Prince, Ward & King (Prince drove "mouse-colored ponies"). Jacob Barker was the king of Wall Street. The Park and the Bowery were the principal theatres; the owners of the former were Beekman and John Jacob Astor, and Oliff was the prompter; the managers were Hamblin, Price and Simpson; the favorite actors were Kean, Kemble, Cooper, Cooke, Wallack and Mrs. Barnes; the playwright (much ridiculed) was Minshall; the scene-painter was Holland. Dominick Lynch, Jr., was the first patron of the opera, and Garcia was the first star. The museum was Scudder's (afterward Barnum's). The public hall was the Washington, on the site where Stewart's down-town store afterward stood. The public market was Fly Market, near Fulton Ferry. The City Hotel was the fashionable inn. Vandervoort & Flandin kept the principal dry goods shop; Adam Geib a music shop, and taught music; Mrs. Poppleton was a confectioner, and "Mother Dawson" kept a livery stable; Christie kept china and glass, and William Cobbett a seeds store; A. P. Goodrich sold books; Eastburn kept a reading room; Saunders made wigs; Baehr was the smart tailor, and Jennings scoured clothes; Pierson was a great iron manu-

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facturer; Reynolds kept a beer shop; "The Pewter Mug" was the favorite drinking place of the Tammany braves, and Simon Thomas, a gentleman of color, was the fashionable caterer. "The Forum" was a debating society to which the chief spouters of the town belonged. The list of prominent citizens is long. The lawyers, politicians, office-holders, and military persons are too numerous to mention. The editors who were also poets were Bryant, and Woodworth, author of "The Old Oaken Bucket"; those who wrote only prose were Coleman, Noah, Spooner, and John Lang (over whose door was a bust of Franklin, preserved by the New York Historical Society). The great doctors were Mitchell, Hosack, Francis, Quackenboss, and MacNevin; and Horne and De Angelis were notorious quacks. Bronaugh was the leading surgeon. Jarvis was the swell portrait painter, and Dunlop was painter and historian of American art. Jacob Sherred was painter and glazier. Bishop Hobart was the chief ecclesiastic. Colden was the principal historian. Paulding was the favorite novelist. Charles King was president of Columbia College. The great merchants were Astor, Mumford, William Bayard and Benjamin Bailey. Mitchell and Hosack were eminent in science, and James E. De Kay was a zoologist. Philip Brasher was an epicure, Baron von Hoffman a society imposter, and Potter a ventriloquist. The best known mayors were De Witt Clinton, Philip Hone and Colden; the county clerks, James Lent and Giles Gilbert; justices of peace, Christian and Warner; the sheriff, James L. Bell, and the court crier, "Barty" Skaats. The crack military company was Murray's Guards. The favorite foreign authors seem to have been Lady Morgan and Mme. De Stael, and Trumbull and West were accounted great painters. Special mention is made of every one of the foregoing, and merciless fun is made of most of them by "The Croakers." The only judicial officer to whom much attention is paid is "The Recorder." The annual flight of the New York city politicians and office-holders was a serious journey of several days by stagecoach in those days, very different from the two-hours trip, alleviated by poker-playing, in a parlor-car compartment, which is the present rule. Therefore the poet wrote "A Lament for Great Ones Departed," i. e. gone to Albany, in which he finds

> "Some consolations still remain,
> For Dicky Riker still is left us!"

and thanks to the poet's witchery this quaint and picturesque legal figure of the olden time is still left us.

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DEATH PENALTY BY BURNING AT THE STAKE IN NORTH CAROLINA.

Hon. Walter Clark.

BLACKSTONE tells us (4 Com., 75 and 203), that for a servant to kill his master, a woman her husband, or an ecclesiastical person his superior was petit treason, and that this offense was punished more severely than murder, a man being drawn as well as hanged, and a woman being drawn and burnt. This law has since been changed in England. It has doubtless been forgotten by most that the offense of petit treason continued in the State of North Carolina, and possibly in some others, after the adoption of our republican form of government, as to slaves at least, and that the punishment usually inflicted was to be burnt at a stake. "History," said a very wise man, "is philosophy teaching by example." It is well to consider closely the doings of our ancestors. When those acts were wise and just, honest and patriotic, they are examples to excite our emulation and shame us against departing therefrom. When the deeds of our forbears are not such as to be cause of pride and imitation, we should rejoice that we live in happier times of greater enlightenment, and can measure the progress we have made by our distance from the evil precedent.

The GREEN BAG has been a depository of much curious as well as useful historical data, which otherwise might ere long have passed beyond proof and beyond recall. I therefore confide to it for preservation a copy of one of the few remaining records of the judicial executions by burning at a stake which have taken place in North Carolina since the adoption of the Constitution of 1776.

The Act of 1741, which remained in force till 1793, provided that if any negroes or other slaves (and there were other slaves in those days) should conspire to make an insurrection or to murder any one, they should suffer death. It was further provided that any slave committing such offense or any other crime or misdemeanor should be tried by two or more justices of the peace and by four freeholders (who should also be owners of slaves) "without the solemnity of a jury; and if the offender should be found guilty, they shall pass such judgment upon him, according to their discretion, as the nature of the crime or offense shall require, and on such judgment to award execution." It further provided that this commission should assess the value of any slave executed by them and report to the next legislature, who should award the owner of such slave the compensation assessed.

The following is a verbatim copy of one of the certificates made to the legislature to procure pay for a slave executed under said Act: —

State of No. Carolina: Brunswick County. March 5, 1778.

At a court held for the tryal of a negro man slave for the murder of Henry Williams, said fellow being the property of Mrs. Sarah Dupree.

Justices of the Peace Present:	Freeholders:
William Gause,	John Stanton,
John Bell,	James Ludlow,
Thomas Sessions.	Needham Gause,
	Aaron Roberts.

According to law valued said Negro James at eighty pounds Procklamation Money.

The court proceeded on said tryall and the said fellow James confessed himself to be One that had a hand in the murdering of said Henry Williams in concurrence with the evidence of four other mallefactors that were Executed for

Being Concerned in said murder on the 18th day of March, 1777.

Ordered that the Sheriff take the said Jimmy from hence to the Place of execution where he shall be *tyed to a stake and Burnt alive.* Given under our hands this 5th day of March, 1778.

Justices of the Peace:	Freeholders:
WILLIAM GAUSE,	AARON ROBERTS,
JOHN BELL,	JOHN STANTON,
THOS SESSIONS.	NEEDHAM GAUSE,
	JAS. X LUDLOW. (his mark)

State of No. Carolina: Brunswick County.

We the undernamed persons being summoned as Justices of the Peace and freeholders of the County aforesaid to hold a court for the Tryall of a negro man slave named James the property of Mrs. Sarah Dupre for the murder of Mr. Henry Williams of Lockwood Folly do value the said slave James at the sum of Eighty Pounds Proclamation Money. Given under our hands this 5th day of March, 1778.

Justices of the Peace:	Freeholders:
WILLIAM GAUSE,	AARON ROBERTS,
JOHN BELL,	JOHN STANTON,
THOS. SESSIONS.	NEEDHAM GAUSE,
	his JAS. X LUDLOW, mark.

The journals of the legislature show that the assessed compensation, "Eighty Pounds Procklamation Money," was voted to Mrs. Sarah Dupree, the owner of the slave.

There is a similar record in Granville County, showing that on the 21st October, 1773, Robert Harris, Jonathan Kittrell and Sherwood Harris, justices; and Thomas Critcher, Christopher Harris, Samuel Walker and William Hunt, freeholders, tried and convicted Sanders, a negro slave of Joseph McDaniel, for the murder of William Bryant, and he was sentenced to be burnt alive on the 23d — two days thereafter. Doubtless there are other records of similar proceedings in other counties, if not destroyed in the lapse of time, but these two will serve as a curious reminder of a bygone age. After 1793 the slave charged with murder became entitled to a trial by a jury of freeholders, and one of the most splendid efforts of the late Hon. B. F. Moore was in behalf of a slave tried for murder. His brief in that case and the opinion of the Supreme Court delivered by Judge Gaston will remain enduring monuments of the claim of both to abiding fame. The opinion and brief will be found reported in State *v.* Will, 18 N. C. 121–172.

While the circumstances I have attempted to rescue from oblivion may not seem to the credit of the men of that day, it is an historical, social and legal fact which will serve to "show the age, its very form and pressure." It is to the credit of the next generation that the statute was repealed by a more humane and just one in 1793, and that the latter Act was afterward illustrated by the learning and impartial justice displayed by court and counsel in State *v.* Will.

It is true of the generations of men as of individuals, that we "rise on stepping-stones of our dead selves to higher things."

LEGAL MEDITATIONS.

WHAT use to me is "Byles on Bills"?
For "Jarman on the Law of Wills"
I wouldn't give a jackstone.
Nor would I give another for
"Juries and Jury Trials," nor
Coke, Bacon, Parsons, Story, or
Fearne, Chitty, Kent, or Blackstone.

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Will Byles help me to pay the bill
I owe for flowers? Can *her* will
Be changed by reading Jarman?
What's "Greenleaf's Evidence" to me?
Or Littleton? Or Parker? He
Is drier than theosophy —
Yes, worse than any Brahmin.

And "Kneeland on Attachments," too,
Has nothing in it that will do —
The title is misleading.
And though through dusty books I read,
Alas, I ne'er can learn to plead
In Cupid's Court, so she will heed,
From "Stephen's Rules of Pleading."

"Collyer on Partnership" I've read,
And vainly too; "Contracts to Wed,"
By some one named Fitzsimmon.
Nor does it seem to help me on
That "Marriage Settlements" I con,
Or Schouler's learned book upon
"The Law of Married Women."

There is no statute I can find
Will make a maiden change her mind;
Nor know I where the place is
To find a law to help me win
A suit like mine — or I'd begin
To search it out. It isn't in
My set of "Leading Cases."

But "Baylies on Appeals"! Ah, there
Is just the answer to my prayer!
I know not how to do it.
From her decision — by the Seal
Of all the Courts! — I will appeal;
And that will make the verdict *nil*
Until I can review it.

J. G. Burnett,
in Love and Laughter.

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THE LANDWARD BOUNDARY OF ALASKA.

By George J. Varney.

IF there ever was another nation so much given to what she calls "rectifying our frontiers" as Great Britain, it must be one that she assisted in the operation until that now unknown nation has neither frontiers nor back tiers remaining. The numerous territorial grants to Englishmen and the encroachments of English colonists ever prove convenient stakes-out-of-line to which the entire old line is made to conform; and thus British boundaries, whenever new interests develop, are "rectified" — always to the enlargement of her domain, but only to her temporary satisfaction.

By the treaty of 1842 between the United States and Great Britain — familiarly known as the Webster-Ashburton Treaty — our northern and eastern boundaries were definitely and finally settled (except in those details depending on the surveyors) from Mars Hill, at the eastern line of Maine, westward to the Rocky Mountains. In regard to the extensive territory between these mountains and the Pacific Ocean, President Tyler said, in his message transmitting the Webster-Ashburton treaty to the Senate: "After sundry informal communications with the British minister upon the subject of the two countries west of the Rocky Mountains, so little probability was found to exist of coming to any agreement on that subject at present, that it was not thought expedient to make it one of the subjects of formal negotiation to be entered upon between this government and the British minister, as part of his duties under his special mission."

This statement affords a reasonably sufficient indication that the government of Great Britain still cherished the purpose of providing not only a northern but a western boundary for this section different to that established by the treaty between the United States and Russia in 1824.

Emperor Alexander I. had, in 1822, issued a ukase claiming the territory of the Pacific coast north of the 51st parallel of north latitude (marking the northerly end of Vancouver Island), and declaring that part of the Pacific Ocean lying north of a line drawn from the point mentioned to 49° north latitude on the Asiatic coast of the Pacific a closed sea. The United States protested vigorously against the exclusion of her whalers from this large ocean area, and to such good effect that, two years later, by the treaty just mentioned, the closed sea was made an open one, and our right to the territory as far north as 54° 40′ admitted without reserve. It is apparent that the action of our government in this matter was not narrow and selfish, but to the benefit of all maritime nations.

Curiously, however, there followed closely on this treaty with the United States another between Russia and England, by which 54° 40′ north latitude was also made the line of demarkation between Russian and British territory. The latter treaty was signed on February 25, 1825, during the last illness of the Tsar Alexander. The two nations at this time, together with France, had just entered into a coalition to aid Greece in throwing off the Turkish yoke; consequently Russia exercised unusual complaisance toward a power in respect to which, from her genius and her great need of seaports for her vast interior, she has subsequently, for a long period, maintained a somewhat different attitude.

There came a time in the reign of the succeeding emperor, Nicholas I., when the advantage to Russia of the maintenance by the United States of her northern territorial

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limit on the Pacific was keenly appreciated. Hon. Cassius M. Clay (minister of the United States to Russia from 1863 to 1869), writing in May, 1867, says that Hon. Robert J. Walker, Secretary of the Treasury under Polk's administration, told him, in 1863, that the Emperor Nicholas had, shortly previous to our war with Mexico, offered to cede Alaska to the United States if the nation would "close up its territory to 54° 40′" (the limit fixed in the treaty of 1824)—which would shut Great Britain out of the Pacific Ocean. "But the slave interest," says Clay, "fearing the new accession of 'free soil,' yielded the point and let England into the Great Ocean."

This was done in the settlement of the "Oregon Question," in 1846. We had in the previous year annexed Texas; and following this, President Polk proclaimed a war with Mexico because of her encroachments on Texan Territory. It was apprehended that there would soon be a European intervention on the western coast, and that England would seize the harbor of San Francisco and the Gulf of California in satisfaction of her claims against Mexico.

There are many persons now living who doubtless remember that "Fifty-four forty, or fight" was one of the favorite electioneering mottoes of the Whig party and the new Liberty party in the campaign which resulted in the election of Polk. The British fur companies, up to this time, had traversed the unsettled regions of the Northwest without let or hindrance until they came to the Russian lines,—establishing their stations in every quarter which yielded them profit. The British government encouraged their enterprise, then claimed as their own territory every region in which the mark of their fur traders had been set. Astoria, on the Columbia River, near its mouth, was one of their important stations; but an American captain was the discoverer of this river, and the American expedition of Lewis and Clark had explored it; so, by international law, Oregon was United States territory; but all northward of latitude 49° was given up.

In consequence of actual and threatened difficulties, Mexico, in the treaty which closed the war, ceded to the United States the territory of New Mexico and California; for which our government paid her $15,000,000. Thus a large portion of our northwest territory was sacrificed to keep British hands off, while, in the interest of the slave power, we acquired the much richer territories at the southwest. The bargain was not a poor one, as matters have since turned,—if, indeed, we should have completed any arrangement with England regarding our northern boundary at that time.

The first price set by the emperor for Alaska was $5,000,000. After the line of Oregon and the United States west of the Rocky Mountains was fixed as at present existing, and England had secured a long seacoast on the Pacific with several excellent harbors, this nation was no longer an aid in holding the English at bay; and the price of Alaska rose to $7,000,000,—ultimately to $7,200,000.

In the treaty with England—thanks to the enterprise of the British Hudson's Bay Company—Russia yielded more territory than the United States had thought of claiming. East of the mountain chain running southeastward from Mount St. Elias, the country was unknown,—having been traversed only by the hunters of the British fur company; accordingly Russia ceded to England all territory east of these highlands and of the 141st degree of west longitude (meridian of Greenwich) northward to the Arctic Ocean. The free navigation of the Stikine River was also granted. This river is navigable for steamboats about one hundred and eighty miles, and furnishes drainage for almost the entire area between the Rocky Mountains of the north and the sea, from about 53° (the parallel of Queen

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Charlotte's Island) to the 65th degree of north latitude, — a territory some five hundred miles in length by four hundred in breadth. After flowing in a nearly direct course westward for about four hundred miles, it crosses the narrow Alaskan coast-strip and discharges into the Pacific Ocean at Frederic Sound, — opposite and nearly eighty miles east of the island on which Sitka is situated, — thus marking off the southern third of the coast-strip.

At that period the entire territory west of the Rockies north of the Columbia River was valued chiefly for rental to the fur companies and for the fisheries in the neighboring sea. The discovery of gold on Fraser River, in British Columbia, led to the colonization of the adjacent regions; but few settled as far north as the southern parallel of Alaska until the discovery of gold on the Stikine. This induced the colonization of the valley of that river, — when a large portion of its basin was found to be a fine grazing country.

As settlements multiplied and the industries of mining, fishing, cattle-raising and lumbering increased, the interposing strip of seacoast assumed larger importance in British eyes. The view of the settlers on this subject is fairly shown in an article which appeared in "The British Colonist" of Victoria, B. C., in 1863.[1] It is as follows:

"The information which we daily publish from the Stikine River very naturally excites public attention to a great extent. Whether the territory through which the river flows be considered in a political or a commercial light, there is a probability that in a short time there will be a still more general interest in the claim. Not only will the intervention of the royal jurisdiction be demanded in order to give to it a complete form of government, but if the land proves to be as rich as there is now reason to believe it to be, it is not improbable that it will result in negotiations between England and Russia for the transfer of the seacoast to the British Crown. It certainly is not acceptable that a stream like the Stikine, which for 170 to 190 miles is navigable for steamers, which waters a territory so rich in gold that it will allure thousands of men, certainly it is not desirable that the business of such a highway should reach the interior through a Russian door of thirty miles of coast. The English population which occupies the interior cannot be so easily managed by the Russians as the Stikine Indians of the coast manage the Indians of the interior. Our business must be in British hands. Our resources, our energies, our undertakings cannot be fully developed in building up a Russian emporium at the mouth of the Stikine. We must have for our productions a depot over which the British flag waves. By a treaty of 1825 the navigation of the river is secured to us. The navigation of the Mississippi was also open to the United States before the Louisiana purchase, but the growing strength of the North made the attainment of that territory either by purchase or by might an evident necessity. We look upon the seacoast of Stikine land in the same light. The strip of land which stretches along from Portland Canal to Mount St. Elias, with a breadth of thirty miles, and which, according to the treaty of 1825, forms a part of Russian America, *must eventually become the property of Great Britain*, either as the direct result of the development of gold, or for reasons which are now yet in the beginning, but whose results are certain. For it is clearly undesirable that the strip, three hundred miles long and thirty miles wide, which is only used by the Russians for the collection of furs and walrus teeth, shall for ever control the entrance to our very extensive northern territory. It is a principle of England to acquire territory as a point of defense. Canada, Nova Scotia, Malta, the Cape of Good Hope, and the great part of our Indian possessions were all acquired as defensive points. In Africa, India, and China the same rule is to-day followed by the government. With a power like Russia it would perhaps be more difficult to get ready, but if we need the seacoast to help us in our business in the precious metals with the interior, and for defense, then we must have it. The United States needed Florida and Louisiana, and took them. We need the shore of New Norfolk and New Cornwall.

"It is just as much the destiny of our Anglo-

[1] The article as here presented is translated from the German version published in the same year in the *Archiv für Wissenschaftliche Kunde von Russland* of Berlin.

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Norman race to possess the whole of Russian America, however wild and inhospitable it may be, as it has been the destiny of the Russian Northmen to prevail over northern Europe and Asia. As the Wandering Jew and his phantom in the tale of Eugene Sue, so will the Anglo-Norman and the Russian yet look upon each other from the opposite side of Behring Straits. Between the two races, the northern half of the Old and New World must be divided. America must be ours.

"The present development of the precious metals in our hyperborean Eldorado will most probably hasten the annexation of the territory in question. It can hardly be doubted that the gold region of the Stikine extends away to the western source of the Mackenzie. In this case the increase of the business and of the population will exceed our most sanguine expectations. Who shall reap the profit of this? The mouths of rivers have as well before as since [since as before?] the time of railroads controlled the business of the interior. For our national pride the thought, however, is unbearable, that the Russian eagle shall possess a point which owes its importance to the British lion. The mouth of the Stikine must be ours, or at least an outer harbor must be established on British soil, from which our steamers can pass the Russian girdle. Fort Simson, Dundas Land, Portland Canal, or some other convenient point, must be selected for this purpose. The necessity of speedy action in order to secure the control of the Stikine is apparent. If we let slip the opportunity, so shall we permit a Russian state to arrive at the door of a British colony."

Charles Sumner comments on this article as follows:—

"Thus, if we may credit this colonial ejaculation, caught up and preserved by German science, the Russian possessions were destined to round and complete the domain of Great Britain on this continent. The promises of gold on the Stikine failed, and it is not improbable that this colonial plan was as unsubstantial."

"During the Crimean war," adds Mr. Sumner, "there seemed to be in Canada a spirit not unlike that of the Vancouver journalist, unless we are misled by the able pamphlet of Mr. A. K. Roche, of Quebec, wherein, after describing Russian-America as richer in resources and capabilities than it has hitherto been allowed to be either by the English who shamefully gave it up, or by the Russians who cunningly obtained it, the author urges an expedition for its conquest and annexation. His proposition fell on the happy termination of the war; but it exists as a warning, with a notice also of a former English title 'shamefully' abandoned."

The English "title" rested only upon a more detailed exploration of the coast, which the Russians had several years earlier discovered and formally taken possession of, by which action, according to established European usage, the designated region became Russian territory. It had ever since stood in Russia's name, and no subsequent effort to impugn her title was made until the recent period when the region was discovered to possess materials of wealth other than peltries. Both the pamphlet and the quoted article show such assurance as might be derived from government approbation.

Since the acquisition of Alaska by the United States, this three hundred or more miles of seacoast, thirty miles in width, has not lost value in the view of either the colonial or the home government, nor of the colonists, whose enterprising nature England knows well how to use. The desire of its possession has now reached that stage, so frankly shown in the colony journal, when any scheme which has in it the capability of effacing old landmarks, receives fond consideration. Accordingly we have recently seen in approved Canadian journals the assertion that the "ten leagues from the sea" (which is given in the treaty as the greatest width of this Alaskan strip of coast) were intended to begin at the western side of the bordering archipelago, the outer shores of the fringe of islands; which mode of measurement would leave the mainland entirely untouched by the boundary line, so that the latter would fall far short of the eastern shores of some of the islands, dividing these into sections of different nationality.

As the terms of the treaty extend the

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line from the parallel of 54° 40′ (which marks the southern extremity of Prince of Wales Island) up Portland Channel to the "highlands," this body of water, under the newer name, "Portland Canal," is, by the unique interpretation, conveyed to another position heretofore occupied by Clarence Strait, separating Prince of Wales Island from another large island lying between it and the mainland. But the strait is terminated at the north by a cross channel, on the other side of which an inlet, which may be considered a continuation of the strait, runs northward into the middle of an island, where it ends. How a line of highlands is to be reached from this insular terminal is a question in topography which would puzzle the most ingenious of engineers. Furthermore, the treaties say that where any such crest cannot be found, the line shall be kept at a distance of ten leagues (thirty miles) from the coast, — inland, or out to sea? Plainly the line lies thirty miles inland from the coast, except when it follows the crest of certain definite lines of highlands within that limit. Has it ever been the usage to regard the islands in the vicinity of a territory as the coast of that territory? If Russia still owned the islands fringing the Alaskan coast, would they be regarded as forming the coast of a section of the United States?

In an article of the treaty by which Alaska was transferred, it is declared that "the eastern limit is the line of demarkation between the Russian and the British possessions in North America, as established by the convention between Russia and Great Britain of February 28–16 (old and new style), 1825, and described in Articles III and IV of said convention, in the following terms:—

"'Commencing from the southermost point of the island called Prince of Wales Island, which point lies in the parallel of 54 degrees 40 minutes north latitude, and between the 131st and the 133d degrees of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from this last mentioned point the line of demarkation shall follow the summit of the mountains, situated parallel to the coast as far as the point of intersection of the 141st degree of longitude (or of the same meridian); and finally from [it] along the said meridian line of the 141st degree in its prolongation, as far as the Frozen Ocean.'

"'IV. 1st, . . . that the island called the Prince of Wales Island shall belong wholly to Russia (now, by this cession, to the United States).

"'2. That whenever the summit of the mountains which extend in a direction parallel to the coast from the 56th degree of north latitude to the point of intersection of the 141st degree of west longitude shall prove to be at the distance of more than ten marine leagues from the ocean, the limit between the British possessions and the line of coast which is to belong to Russia as above mentioned (that is to say, the limit to the possessions ceded by this convention) shall be formed by a line parallel to the winding of the coast, and which shall never exceed the distance of ten marine leagues therefrom.'"

"'Article VI. [Mention is here made of the sum to be paid by the United States to Russia for Alaska.] The cession of territory and dominion herein made is hereby declared to be free and unincumbered by any reservations, privileges, franchises, grants or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property-holders; and the cession hereby made conveys all the rights, franchises, and privileges now belonging to Russia in the said territory and dominion and appurtenances thereto.'"

Secretary Seward, in a note to the Russian minister, pending the consideration of the treaty by the President, informs him that he must especially insist upon what was made the last clause, and must regard it as an ultimatum. The $200,000 addition to the price named at the beginning of the negotiations was in consequence of the provisions of this clause, — which procured the extinguishment of the leases to the Russian and British fur companies, and all others.

A report from London at the last of

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January of the present year represents that Premier Salisbury and the Colonial Secretary, Hon. Joseph Chamberlain, "have been considering the result of the inquiries into records made in behalf of British Columbia," especially those derived from certain documents found in Montreal; and it is claimed that these show Clarence Strait to be the true Portland Channel or "canal," or "inlet," — as it is now interchangeably called by the promulgators of these novel views. On this basis, the statement has been flung out to the public that "under the Anglo-Russian treaty of 1829" there belonged to Great Britain, on this coast-strip an area of "3,000-000 acres, opposite Prince of Wales Island on the Pacific coast, which is of high strategic commercial value, and which the United States has usurped since buying Alaska." It was also suggested from the same source that "the Canadian members of the Alaskan Boundary Commission have been misled into assuming the correctness of the United States' assumption."

In reply to this announcement it may be remarked, first, that Montreal is a strange place for the storage of the essential and authentic data of a treaty boundary between two European nations; second, that the language of the last American-Russian treaty and that of the Anglo-Russian treaty of 1825, in respect to this southern and eastern boundary, is identical; and that no "Anglo-Russian treaty of 1829" is mentioned in our Alaskan title-deed; third, this interpretation puts the Stikine River wholly into British territory, so that the specific grant of the navigation of any part of it to the British would be contradictory and useless — thus the absurdity of the new interpretation is apparent; and fourth, that Portland Channel is clearly delineated on the charts made by Captain Vancouver of the royal navy, which are the highest British authority, and were in existence and in the possession of the English government in 1825, when the treaty in evidence was concluded, — so that there can be no reasonable doubt as to which body of water is "Portland Channel." The uncertainty about the identity of this body of water is of recent date, and appears to have been sedulously cultivated.

This strip of Alaskan seacoast nearly five-hundred miles long, extending south by southeast from the body of the territory, appears but as the tail to the dog, and, by the uninformed, may be thought of very little consequence; nevertheless in this case the tail wags the dog; for while its soil is of average fertility, its climate is superior to that of any other section of Alaska. It also contains a large proportion of the population, having among its towns the two largest in the territory, — Sitka, on an island midway of the strip, the seat of government, and having, in 1890, 1190 inhabitants; and Juneau, with a population of 1253, — situated in the interior of the mainland, northern section, in the midst of a rich mineral and grazing region. A governor of the Alaskan territory was appointed in 1884, when, also, a district court was established. Previous to that date it was impossible for a settler to buy public land.

This long southeastern angle of Alaska is fortunately the only one which affords a possibility of being placed in doubt, or concerning which there can be any confusion; for from Mount St. Elias, at the northern end of the elongated southeastern angle, the boundary between Alaska and British territory is formed by the 141st parallel of longitude; and any dispute in regard to it can be settled by the diplomacy of the surveyor's theodolite and links. Indeed, as ardently as Britain wished to include in her domain the rich gold-fields of the Yukon River (which crosses this boundary in nearly an east and west direction), the line run by her own surveyors, and completed last year, agrees very closely with that of our own surveyors, — throwing all the gold deposits now known on that river and its tributaries within the limits of the United States.

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THE LAW COURTS OF BELGIUM.

By John Ball Osborne,

Of the Philadelphia Bar, Late U. S. Consul at Ghent, Belgium.

I. The Court-house at Brussels. — The administration of justice, involving as it does the lives, liberty, honor and fortunes of the inhabitants of a country, is always solemn and calculated to inspire awe and command respect, no matter how common the environment may be. But these sentiments are intensified and the proceedings rendered more dignified and impressive when the court-room is vast and magnificent, yet simple in its embellishments, and when the members of the bar as well as the judges appear in black gowns. At any rate, such were my impressions when I attended a Belgian trial for the first time in the "Palace of Justice" at Brussels.

The building is a fitting tribute to the majesty of the law, being a superb specimen of the Graeco-Roman style, erected 1866–1883, after plans by the architect Poelaert, at a cost of about twelve million dollars. It covers an extent of more than six (6) acres, and the apex of the lofty dome is four hundred feet above the pavement. Within this grand temple are assembled all the law courts of the capital, from those of the petty *juges de paix* to the supreme *Cour de Cassation.*

II. The Codes. — Belgium has closely imitated France in her jurisprudence and procedure, and is now a land of codes. There is a formidable series of them, comprising the Civil Code, adopted in 1803, and commonly known as the Code Napoleon; the Code of Civil Procedure, adopted 1806; the Penal Code, adopted 1867; the Code of Criminal Instruction, adopted 1808; the Code of Commerce, adopted 1872; the Forestry Code, adopted 1854; and the Rural Code, adopted 1886. They are founded on the principles of the Roman law, and are in many respects admirable institutions. The Civil Code, for instance, is a mine of information concerning the private rights and personal contracts of daily life; and the layman may, by studying it, become a fairly good counselor.

The entire codical series is published in a single black-bound volume, which has the form of the familiar Baedeker, but double its thickness. This handy embodiment of the law and practice of every court in the country is the lawyer's inseparable companion. If you go to him for legal advice, the moment he learns that you come to consult him in a professional capacity, he reaches for his *vade mecum*, and when you have stated matters, he thumbs rapidly over a few hundred pages and finally points triumphantly to a paragraph of the wonderful code, which seems to have been framed expressly to fit your case.

III. Organization of the courts. — The *juges de paix* (justices of the peace) constitute the lowest judicial stage. There is one justice, besides two deputies, for each judicial canton. They are appointed by the king, and must be at least twenty-five years of age and have acquired the university degree of Doctor in Law. Their functions are quite numerous. The primary purpose of their institution is to provide a paternal medium of conciliating those who seek to litigate trifles.

In civil matters they have jurisdiction in all actions: (1) in last resort when the amount in dispute is less than $20; (2) in first resort for amounts from $20 to $60, and (3) in first resort for any higher amount in all disputes between landlord and tenant, and a few other matters. Controversies between creditors and debtors, landlords

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THE COURT HOUSE AT BRUSSELS.

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and tenants, and employers and domestic servants furnish the justices with the bulk of their business.

In penal cases they try offenders for infraction of police regulations, and thus exercise the functions of police judges. But the duty of hearing and committing or binding over prisoners charged with crimes does not belong to them, but to the *juges d'instruction*, or investigating magistrates.

The justices have voluntary jurisdiction in presiding over family councils (*quasi-judicial* bodies), receiving declarations relative to the adoption or emancipation of minor children, imposing seals on the property of deceased persons, and officiating at inventories and sales in bankruptcy.

The procedure before them is simple. Parties may appear in person or be represented by counsel, or even by attorneys in fact. When the justice sits as a police judge, the commissary of police acts as the public prosecutor.

A *Tribunal de Première Instance* is established in each judicial *arrondissement*, and is composed of from three to ten judges and deputy judges, who are named by the king for life. A president and vice-president judge are chosen for each tribunal by the king from double lists submitted by the Provincial Council and the nearest Court of Appeal. A minimum age of twenty-five years, possession of the degree of Doctor in Law, and a legal practice or judicial experience of at least two years are the essential qualifications of the judges of this court.

Each Tribunal of Primary Instance is divided into two chambers, known respectively as the Civil and the Correctional. The former is competent in all matters except those attributed to the justices of the peace and special courts: (1) in last resort for amounts up to $500, and (2) in first resort for any amount exceeding $500. It also hears appeals from civil judgments rendered in first resort by the justices, and reviews the decisions of the courts of foreign countries in civil and commercial cases.

The Correctional Chamber has jurisdiction in cases of misdemeanors punishable by correctional penalties (viz.: imprisonment of eight days to five years, or fine of at least $5), and even of crimes under certain circumstances. It also hears appeals from the police courts.

It will, therefore, be noticed that the Civil Chamber corresponds to the American Court of Common Pleas, while the other branch has some of the attributes of our Court of Quarter Sessions. In both chambers the court sits with three judges on the bench, including the president judge, and hears and decides cases without the aid of a jury. For this reason the personality of the judges is of more interest and importance to litigants than with us. In the Correctional Chamber a *procureur du roi* acts as the public prosecutor.

A *Tribunal de Commerce* is established in every important locality; but where there is none in an *arrondissement*, the commercial jurisdiction is exercised by the Tribunal of Primary Instance. The judges of the Tribunals of Commerce must be at least twenty-five years of age and have exercised some business with honor and distinction for a period of at least five years. They are elected for two years by merchants qualified as communal electors and paying annual direct taxes to the amount of $4.

These tribunals are of high utility, and have jurisdiction in all disputes relating to trade and commerce, particularly those between partners, actions against factors and shipping agents, and in cases of bankruptcy. They also hear appeals from judgments rendered by the *Conseils de Prud'hommes* (trade councils). When the amount at issue does not exceed $500, the judgment of the Tribunal of Commerce is final; but for amounts in excess of that sum an appeal lies to the Court of Appeal. Judgments are rendered by three judges, including a pres-

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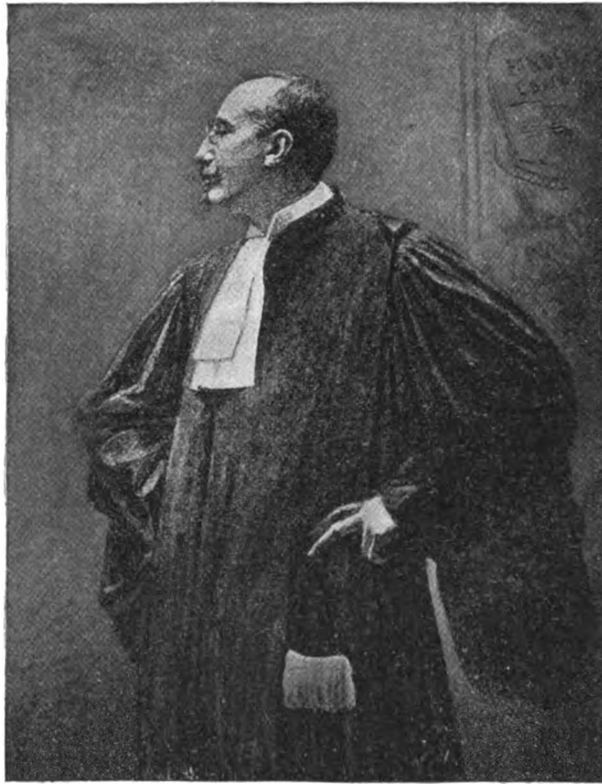
ident judge. The procedure is very simple, and parties may conduct their cases without the aid of counsel.

A Court of Assize is held in the capital city of each of the nine provinces every three months for the trial of those accused of crimes. Trial is by jury. A sketch of the procedure is given below. An appeal lies from this court direct to the *Cour de Cassation.*

There are three Courts of Appeal, established respectively at Brussels, Ghent and Liege, for the purpose of hearing appeals from judgments rendered in first resort by the Tribunals of Primary Instance and the Tribunals of Commerce. Each court is divided into a Civil and a Correctional Chamber. The former is composed of seven councilors (judges), including a president judge, an attorney-general and a recorder; and the latter of six councilors, an attorney-general and a recorder. The councilors are appointed by the king from double lists submitted respectively by the Provincial Councils and the Courts of Appeal. The presence of five councilors, including the president, is necessary at a trial. A *procureur-général* of the king, an attorney-general, and substitutes conduct the prosecution on the correctional side of the court.



A TYPICAL BELGIAN LAWYER.

Another section of each Court of Appeal is the *Chambre des Mises en Accusation,* which holds sessions at least once a week for the purpose of hearing the report of the *procureur-general* concerning the prosecution of criminals. This chamber determines whether to liberate the accused for want of sufficient evidence, to send them before a correctional tribunal, or, in case of serious crime, before the Assizes.

Majestically towering above all the tribunals already described, rises the *Cour de Cassation* (Court of Annulment), the supreme body which exercises a constant surveillance over all, and aims, by its decisions, to maintain a harmonious and uniform jurisprudence. It sits at Brussels and is composed of a first president, a president of chamber, and fifteen councilors who are named by the king from double lists presented respectively by the court itself and the Senate.

This august court consists of two chambers; one of which hears appeals in civil cases, and the other in criminal and police matters, besides special matters attributed to it by law. In united chambers it hears trials of impeachment of the king's ministers and decides conflicts between the executive and judicial authorities. Whenever the chambers sit separately there must be seven councilors on the bench, including the president. But when the court is united at least thirteen councilors must participate. A *procureur-*

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général and two attorneys-general represent the State in this court. Except on the trial of a cabinet minister the *Cour de Cassation* only reviews the record and does not enter into the details of cases. Judgments and decrees of the lower courts can, therefore, only be brought before it on appeal for errors.

IV. Criminal Procedure. — The leading figure in the criminal proceedings prior to trial is the *juge d'instruction* (judge of instruction). One or more of these functionaries are chosen by the king from among the judges of each Tribunal of Primary Instance and are attached to that court. Their duties are to investigate and establish the perpetration of crimes brought to their notice, to collect evidence against suspected persons, and to issue warrants for their arrest and imprisonment awaiting trial.

In all the judicial machinery of Belgium there is nothing, with the possible exception of the gendarmes (judicial police), that so terrifies malefactors as the judge of instruction, before whom they must appear immediately after arrest and be subjected to long and harrowing examinations and cross-examinations, which sometimes extend through several days, until they are either entrapped by skillfully elicited contradictions or finally end the ordeal by confessing.

The propriety of extorting a judicial confession by such inquisitorial methods may very well be questioned. I have heard well informed persons assert that under the Continental system a prisoner is presumed guilty until he proves himself innocent. This would, indeed, be a very grave weakness if it were true; but I have found nothing to support it except the bullying methods of the judge of instruction. On the contrary, the Belgian constitution and national codes, founded on the wisdom of centuries and deeply imbued with a spirit of equity and justice, are quite inconsistent with any such theory. In fact, prisoners awaiting trial are detained in special jails and treated with more consideration than after conviction.

When a crime is committed and the perpetrator is not immediately apprehended, the wheels of justice are set in motion either at the instance of the *procureur du roi*, or on complaint lodged before the judge of instruction by an injured party, who constitutes himself the "civil party," i. e., private prosecutor. Very often the prosecuting officers receive their first information of the crime and its author from an anonymous communication termed a "denunciation."

The first duty of the judge of instruction is to cite before him those who are likely to throw any light upon the circumstances of the crime, and to examine these witnesses separately and *out of the presence of the accused.* In grave cases, for example a mysterious murder, the *parquet*, consisting of the judge, *procureur*, and an associate, makes a "descent" on the scene and holds an inquest in the nature of that of a coroner. If caught, the prisoner is generally committed to prison without bail. However, under certain circumstances bail is allowed for lighter offenses by a council of judges, to whom the judge of instruction must make a report of his acts at least once a week. After his work is completed the Chamber of Accusations, above described, passes upon the case.

At the trial the prisoner is allowed counsel, and if he has none the court must assign him an attorney under pain of nullity of the proceedings. A witness cannot be interrupted while giving his testimony, but after he has finished the accused or his counsel may question him through the intermedium of the president, attacking the witness as well as his testimony. The private prosecutor is also confined to the same medium in questioning the prisoner. The president may require the witnesses and the prisoner to give any explanations likely to make their testimony clearer, and with this end in view the other judges, the *procureur* and jurymen are allowed to suggest interrogatories to the president.

After the evidence on both sides is closed,

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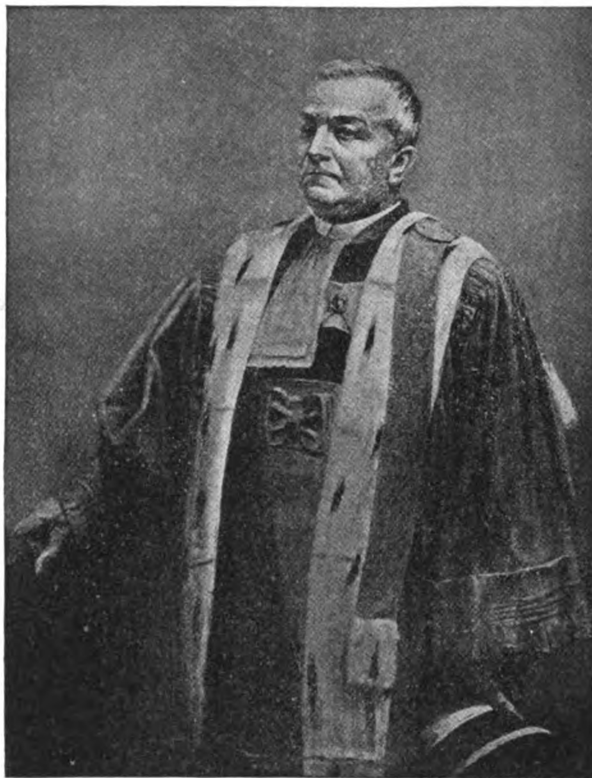
the "civil party," or his counsel, and the *procureur* plead their case, or, in the language of the code, "develop the means which will support the accusation." The prisoner and his counsel reply. The other side may then be heard in rebuttal; but at all events the defense must have the final address. The president then declares that this part of the proceedings is at an end and the case now rests with the jury.

Trial by jury is one of the beneficial institutions which Belgium owes to France. Introduced in 1791, it was abolished in 1814, but forever re-established by the constitution of 1831 in the case of crimes, political offenses, and abuses of the press. Trial is by a jury of twelve. Jurymen must be Belgian citizens and aged at least thirty years. Officials, soldiers, priests and certain other persons are exempt from service. Both the prosecution and the defense have several peremptory challenges.



THE PROCUREUR GÉNÉRAL OF THE COUR DE CASSATION OF BELGIUM.

Before sending the jury out, the president reminds them of their duties, and then propounds to them the following questions, to each of which they must give a categorical answer — "yes" or "no." The principal fact, or question resulting from the indictment, is thus framed: "Is the accused guilty of having committed such murder, such robbery, or such other crime?" If there be any aggravating circumstances not mentioned in the indictment the jury will be asked: "Has the accused committed the crime under such or such circumstances?" When the prisoner has offered in extenuation any fact admitted as such by the law, this interrogatory will be added: "Is such fact established?" If the prisoner be under sixteen years of age, still another question will be put to the jury: "Has the accused acted with discernment?"

The jury then retire and vote by secret ballot separately on each question. A majority prevails and a tie vote is taken as favorable to the accused. But if the prisoner be declared guilty of the principal fact by the bare majority of seven to five, the judges must deliberate on the same point, and unless a majority of them agree with the verdict of the jury the accused is acquitted.

In some of our States, by recent changes, a majority of the jury, or at least a less number than twelve, may render a verdict in civil cases. This is, perhaps, a wise provision. But the merit of the Belgian criminal system, or in fact of any system different from our own, of requiring the unanimous verdict of twelve men to convict a prisoner of any crime, admits of serious doubt.

An appeal lies from the Court of Assize to the *Cour de Cassation*, which will nullify the proceedings and remand the case for a

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new trial unless all the formalities laid down in the Code of Criminal Instruction have been faithfully followed. I may add that a person accused of a crime punishable by a correctional penalty, who escapes and is not caught, may be tried and convicted by default.

There is only one matter pertaining to the subject of judgment and execution that is of special interest, and this concerns capital punishment. It is still in force in Belgium and is not infrequently imposed. But Leopold II, the present king, has scruples against its infliction and invariably commutes the penalty to that of *travaux forcés à perpetuité*. Many believe that this is worse than death, and the glimpses which I have caught of life within the prison walls lead me to coincide. The life-convict is sent to the central penitentiary at Ghent, where he undergoes solitary confinement in the cellular department for ten years. The discipline is terribly rigorous. If at the end of that time he is still living he is allowed to pass into the common quarter and there to spend the remainder of his days.

V. Avoués. — Connected with the Tribunals of Primary Instance, Courts of Appeal, and the *Cour de Cassation* are certain ministerial officers called *avoués*, whose services are obligatory. They virtually constitute a grade of lawyers, for they represent the parties in court and attend to the required formalities of inscribing and systematizing the case, draw up documents of procedure, lay down a summary exposition of the demands of one party and the defense of the other, and expose the conclusions which the *avocats* must thereupon develop. In fact, they prepare what corresponds to our written pleadings. As I have stated, their services cannot be dispensed with, and constitute a fruitful source of unavoidable expense in litigation.

VI. *Avocats.* — The profession of the law is highly respected in Belgium and is followed by many gentlemen of the nobility, which class still preserves its ancient prejudice against engaging in trade. The youngest and most obscure lawyer is invariably addressed as "*Monsieur l'avocat.*" This is the simplest of titles, but its significance consists in the fact that one never hears "*Monsieur le boucher,*" "*Monsieur le boulanger,*" etc.

Admission to the bar is only obtained by those who take a course of four years in the law department of one of the four universities (Brussels, Ghent, Liege and Louvain), and receive the degree of Doctor in Law. The Belgian university is not an institution for general culture, but merely a group of professional schools. However, an academic education, embracing classical languages, higher mathematics, natural science, history and geography, is required for admission. The annual fees for lectures in the "faculty" of law are $50, besides $20 for each examination to which the student is admitted. The law course includes Roman law (particularly the pandects), public and administrative law, Belgian criminal law, modern civil law, commercial law, court organization, civil procedure, and political economy.

The total number of law students has fallen off in the last fifteen years. In 1893 it was 1024. A large percentage of those inscribed fail in their final examinations, and so the annual crop of lawyers scarcely amounts to 200. But this is enough for a country which is no larger than the state of Maryland, even although the population does exceed six million.

Young lawyers serve an apprenticeship of three years in the office of an older practitioner. During this period they are called *avocats stagiaires*, and are obliged to serve the poor without charge. Every lawyer before being allowed to practice and charge fees (delicately styled *honoraires*), must have his name inscribed in the *Ordre des Avocats*, which is the bar association of each locality, and is presided over by a *batonnier*. The members are subject to the jurisdiction of the Council of Discipline of the Order, which is empowered to inflict disciplinary

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penalties upon offenders, and even to disbar them. Unlike the case of the *avoués*, the services of the *avocats* are not obligatory. It is customary for the lawyer, like all other professional men in Belgium, to have his office at his place of residence.

The average Belgian *avocat* is considerably older than his American *confrère* when he first obtains a comfortable practice. Indeed, professional, like industrial competition, is so keen that scores of lawyers constantly present themselves as applicants for governmental and commercial clerkships, of which the salaries are only three or four hundred dollars a year.

VII. *Huissiers.*—The *huissiers* are officers of the court named by the king from triple lists presented by the courts. They have some of the functions of our sheriffs, constables and process-servers. They draw up and serve citations, summonses and legal notices; execute judgments, decrees and orders of the court; make levies on real and personal property; and conduct public judicial sales of personal property.

The *huissier* is a genuine terror to unstable debtors. His very name—pronounced *whis-see-ā*—is suggestive of the sweeping hurricane. He is the veritable wolf that the tradesman struggles to keep away from his door; for his visit is very often the precursor of bankruptcy and ruin. Occasionally one sees a stamped legal document pasted on a store window or door. This is an invariable sign that poor Mynheer Van der Haege has been unable to meet his obligations and that a visitor feared almost as much as the pest has made his appearance. A few days later an immense canvas awning is stretched from the upper story across the sidewalk, and a long table and benches are disposed under it for the accommodation of the public. Then follows the public auction, at which the *huissier* presides and sells for the benefit of creditors the goods of the unfortunate merchant faster than the latter was ever able to do in his palmiest days.

VIII. *Notaires.*—The *notaires* (notaries) of Belgium have the general attributes of notaries-public and conveyancers in the United States, in addition to others which make them far more important functionaries. They are appointed for life by the king, and to be eligible must have attained the age of twenty-five and have completed an apprenticeship of several years in the office of a *notaire*, during which period they are known as *candidats-notaires*. The universities also confer the degree of *Candidat-Notaire*. The number of notaries is limited, and sometimes many years elapse before a qualified candidate receives the coveted nomination which fixes his place of official residence. It is alleged that politics often accounts for this delay.

Notaries draw up and receive acknowledgments of all acts and contracts to which it is necessary or expedient to give public authenticity. They preserve originals of all such acts, send duplicates of them to the office of the clerk of the Tribunal of Primary Instance, and deliver to interested parties partial or complete copies either on stamped or unstamped paper. Most acts may be executed under private signature without the intervention of a notary; but certain instruments, such as marriage contracts and gifts *entre-vifs*, must be executed before a notary in order to be valid.

The notaries are usually called upon to assist in the making of wills. Their services are not necessary in the case of holographic and privileged testaments; but they must participate in "testaments by public act" and "mystic testaments." The testament by public act is one received by two notaries in the presence of two witnesses, or by one notary in the presence of four witnesses. The mystic testament is very peculiar; it is one which the testator writes, or causes to be written by another person, and presents *closed and sealed* to a notary in the presence of *six witnesses*. The notary then draws up an act setting forth the declaration of the

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testator to the effect that the document is his last will and testament. This secret will is preserved in the "minutes" of the notary, as is also the testament by public act. Besides being the guardian of wills the notary actively assists in the settlement of estates, and in relation thereto acts as a friendly *factotum* for the family.

His most important function, however, is the exclusive right to sell real estate at public auction. This constitutes his chief source of revenue, for he receives a commission on all sales. In fact, the relative value of the business of different notaries may be estimated by noting the number and importance of the properties which they advertise for sale on conspicuous posters affixed to the public bill-boards. Sales are rarely effected in a single *seance;* but fresh posters are put up announcing the highest bid, and the property is knocked down at the second or third session.

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THE QUAINT LAWS OF HOWEL DDA.

By George H. Westley.

THE sociologist, the student of legal lore, and the searcher after the picturesque in mediaeval literature, all may find in the quaint laws of Howel Dda an abundant store of treasure. Howel Dda, or Howel the Good, ascended the throne of Old South Wales in 909, and reigned for forty-one years, during which period he carefully revised the standing decrees of his predecessors, and added such new ones as he deemed necessary for the proper governing of his people. The Howellian Code is contained in three books, the first dealing almost wholly with the laws regulating the Royal Court, the second chiefly with those relating to women, and the third, or Proof Book, with those pertaining to the crimes of murder, theft, arson, etc. Let us take a brief glance through the three books in turn.

The Royal Court consisted of twenty-four officers, sixteen of whom waited upon his majesty, while the other eight attended upon the Queen. These dignitaries were entitled by law to receive a suit of woolen garments from the King, and a suit of linen from the Queen three times a year, at Easter, at Whitsuntide, and at Christmas.

Having thus provided for the decencies of the Court, the first book goes on to deal with the "worth" of each member thereof. Naturally the King is the most precious personage of the lot. We are told that his value is his "saraad" threefold, a saraad being the satisfaction allowed by law for injury. There is mentioned the King of Aberfraw, whose saraad was "a hundred cows for every cantref (i. e. hundred townships) in his kingdom, and a white bull with red ears to every hundred cows, and a rod of gold of the same length as himself, and as thick as his little finger, and a plate of gold as broad as his face and as thick as the nail of a ploughman who has been a ploughman for seven years." Such was the penalty for injuring the King, and such threefold was his personal value.

The Queen also had her saraad, and it might be claimed by her from anyone violating her protection, striking her a blow, or snatching anything out of her hand. It was only a third of the King's however, and was to be paid without gold or silver, as though a feminine fondness for those precious metals might tempt her to provoke insult.

First among the officials of the Court was the Chief of the Household. This functionary was allowed by law "three messes and three hornfuls of the best liquor that may be in the Palace." The Priest, who ranked second, was not treated so liberally, being allowed only one mess and one hornful of liquor, quality not mentioned. Yet while thus stinted in the matter of food and drink, the Priest received courtly deference as the representative of the Church, for the law reads, "he is the King's confessor, to whom the King is to rise and to sit down after him and to hold his sleeves while he shall wash himself."

Passing over the Steward, one of whose duties is to "swear for the King," and the Chief Falconer, who was compelled to lodge in the barn, "lest smoke should effect his birds," we come to the fifth on the list, the Court Judge. Law in the tenth century seems scarcely to have been a liberal profession. At any rate this dignitary was not very generously treated by the Howellian Code. His worth was reckoned at only six kine and six score of silver, a value no greater than that of the page, the cook, and the very lowest on the list, the candle-bearer. He had to "administer justice without fee" to everybody at the palace, and to "share with the other judges" the

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twenty-four pence which he received for each lawsuit about land. For every outside judge he examined, however, he was to have twenty-four pence all for himself. Presumably he had plenty of spare time, for the law allowed him, wherewith to amuse himself, "a throwboard of the bone of a sea animal," a game resembling chess, played with a black king and eight black men, against sixteen white men.

Next on the list are the Groom and the Page. The latter was to make the royal bed, to carry the King's messages, and to take care of his personal treasures. For these services the law allowed him his land free, a horse, and his majesty's cast-off bedclothes. Eighth on the list is the Bard, and ninth the Silentiary or Husher, whose chief duty was to keep silence and to strike the pillar above the Priest when the latter blessed the food and chanted the "Pater."

Then came the Chief Huntsman. An amusing law in connection with this functionary was this: that lest sport should be spoiled some day by the Huntsman being hunted by the bailiffs, it was specially provided that throughout the hunting season he was not to answer any claim "unless he be taken before he has risen from his bed, and has put on his boots."

After this privileged character comes the Mead-brewer and the Mediciner. Like the Judge's, the Mediciner's seems to have been rather an unlucrative position, for he had to administer medicine gratuitously to all within the palace, and to receive nothing from them except their bloody clothes; unless indeed the patient's skull was cracked or his limbs broken, when, besides the clothes, he was entitled to nine score pence with his food, or else one pound without it. He was permitted to have an outside practice, but his fees were small and strictly regulated by law.

The Butler, the Doorward, the Cook, and the Candle-bearer complete the list of the King's officers. The duty of the latter was to hold a candle opposite the dish while his majesty was eating, and to walk before him when he retired to his chamber. He had also to light all the wax candles in the Palace on state occasions, and as a perquisite he was to have "the wax he may bite off their tops."

Next follow the laws governing the Queen's eight attendants, and then we are made aware of the fact that there are eleven more officers, termed "officers by custom." Captain of the eleven was the Groom of the Rein, second the Foot-holder, whose important duty it was to hold the King's feet in his lap from the time he began the banquet until he fell asleep. He also had to "rub the King," and see to it that his royal master did not doze over some prosy after-dinner speech. The Bailiff, who ranked third, was allowed three score pence for every person who entered his jail. The Apparitor was evidently the Court fireman, for he had to "stand between two pillars, with a rod in his hand, and watch lest the house should be burned whilst the King is at meat." A very curious law concerning this functionary was that if he entered a house wherein death had taken place, he was to have "the meat and the butter in cut, the lowest stone of the quern, the green flax, the lowest layer of corn, the hens, the cats, the fuel axe, and the headland or the skirts of corn uncut." Truly the apparition of the Apparitor under such circumstances must have been hailed with terror.

The Porter is the fifth of the officers by custom, and like the railroad variety of our day, his perquisites were vast. He was to have a handful of every small gift, such as fruit and eggs, and herrings, that entered the palace gate. He was also to have "the sow which he shall be able with one hand to lift by her bristles until her feet are as high as his knee." And furthermore he was to receive his land free, his food from the palace, and — a caution to guinea-pigs and Manx cats — "any animal that came

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through the gate without a tail." Indeed a good deal more space seems to have been given to the Porter's perquisites than to his duties.

Only one other of the eleven is worth particular mention, and that is the Watchman, to whom the law allowed "the eyes of the animals slaughtered in the palace." Whether or not these were supposed to assist him in his vigil I am unable to say.

The thirty-five officials thus disposed of, the first book of the Howellian Code comes to a close with a few random laws more or less connected with the Court. One of these laws ordains that there are three things which the King is not allowed to share with anyone else, viz., "his treasures, his hawk, and his thief." What the duties of this latter functionary were is not stated.

I mentioned early in this article that the Queen might claim saraad for the violation of her protection. This protection feature should be explained before I pass on to the consideration of books two and three. It appears that each person connected with the Court had the power to give temporary asylum, such protection being limited by the holder's rank and position. Thus if an offender enjoyed the protection of the Page, the protection lasted "from the time one goes to get a burden of straw to put under the King, and, upon his return, make his bed, and spread the clothes thereon at night, until he shall take them off on the morrow, to convey away an offender without pursuit." Or if his protection was that of the Huntsman, it was "to convey him so far that the sound of his horn can scarcely be heard." The Falconer's was specified as being "as far as he shall fly his hawk at a bird"; and the Mead-brewer's "from the time he shall begin to make a vat of mead, until he shall tie the covering over it."

The Church's right of sanctuary is dealt with at some length. The offender under its protection was allowed only "to walk about within the churchyard and the burial ground." If he went outside these boundaries he rendered himself open to the grasp of an outraged law. A graveyard is certainly not a very cheerful stamping ground, but a confinement there may have had a beneficial effect upon the culprit's morals by causing him to reflect upon his iniquities.

We now come to book the second, which, as I stated before, deals chiefly with the laws concerning women. The first clause reads rather curiously: it provides that "if a woman be given in marriage, she is to abide by her 'agweddi' (her dower) unto the end of the seventh year, and if there be three nights wanting of the seventh current year, and they separate, let them share into two portions everything belonging to them." Then lest the division of their property under such circumstances should lead to troublesome dispute, the law proceeds to divide it for them. It gives "the swine to the husband and the sheep to the wife; if there be only one kind, they are to be shared, and if sheep and goats, the sheep to the husband and the goats to the wife." Continuing it apportions their household goods and chattels in like manner, except however that the wife seems to get the lion's share. "The clothes that are over them belong to the wife; the clothes that are under them belong to the husband, until he marries again, and after he marries the clothes are to be given up to the wife; and if another wife sleeps upon the clothes, let her pay 'wyneb-worth,'" — that is, face value, — "to the other." Of the kitchen utensils the wife was to have all save one pail, one dish, and the drinking vessels. These latter went to the husband, but whether or not that he might put them to certain obvious uses, and so drown his troubles, is not stated.

But while the woman seems to have got the better of it in the opening clauses, in clause seventeen she is treated quite rigidly:

"If a woman be given to a man, and her property specified, and the whole of the property had ex-

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cept one penny, and that be not had, we say that the man may separate from her on that account, and she cannot reclaim any of her property; and that is the single penny that takes away a hundred."

The nineteenth clause provides that if a married woman commit a heinous crime, either by giving a kiss to another man, or other act, she must give saraad or compensation to the offended husband. If a woman found her husband with another woman she could claim "gowyn," or payment for his infidelity. Should a man take a woman to his house for three nights, the law recognized the cohabitation as a kind of marriage, and he could not part from her without giving her three oxen. If the connection continued for seven years, she was as his betrothed wife in respect of property.

Having thus given precedence and much space to the fair sex, Book the Second goes on to deal with the general laws of the country. Turning over the pages we come to the following: —

"If he (a thief at the gallows) should assert that another person was an accessory with him in the robbery for which he is about to suffer, and he should persist in his assertion unto the state God went to, and he is going to, his word is there decisive and cannot be gainsayed; nevertheless, his fellow-thief shall not be executed, but is a saleable thief; for no person is to be executed upon the word of another, if nothing be found on his person."

That the lawyers of mediaeval Wales were prone to disagree is shown in clause twenty-seven, which runs thus: —

"If there be a surety for a debt, and before the time of payment the surety die and leave a son, the son ought to be responsible for the father's debts. Some say that if that son willeth to deny his suretyship over the grave of his father, the legal denial is to be given. We say it ought not to be; for the learned say that the law of this world can affect a person, whether he be gone to heaven or hell, only until he goes to this earth. The cause is that, although there be law between man and man, upon this earth, there is no law between devil and devil, and there is no law between angel and angel, only the will of God."

Considerable space is next given to the statutes concerning landed property, and the methods of procedure in lawsuits there anent. Such lawsuits seem to have been conducted in the open field. The King presided in such cases, having two judges, four priests, two elders, and four good men to help him with their counsel. It was expressly stipulated that the King should be seated "with his back to the sun or to the weather, lest the weather incommode his face." The plaintiff and defendant were each to have a "guider" and "pleader" at his side, and an "apparitor" behind him. When the Court was seated silence was ordered on the field, and anyone who broke this silence had to pay a fine of three cows or nine score of silver. These went to the King. After the pleadings, the two judges and the four priests retired to consider the case. Prayer was offered that God might show them the right. After due deliberation, the Court reassembled in the field, and the verdict was proclaimed.

Book third of the Howellian Code was termed the Proof-Book. This title seems to have been derived from the fact of a judge's knowledge being "proved" by his being thoroughly acquainted with its contents. Here we find many quaint and peculiar decrees. For instance in the laws pertaining to arson we read: "If swine enter a house and scatter fire about so as to burn the house, and the swine escape, let the owner of the swine pay for their act. If the swine be burned, it is an equation between them, as being two irrational things; and therefore, where there is an equation by law, there is nothing to be redressed, but one is set against the other."

The thief of old Wales had a pretty hard time of it. A law concerning him reads: "For theft to the value of fourpence the the thief is saleable, and for a greater amount forfeits his life," a penalty which for a fourpenny-ha'penny steal was certainly outrageously heavy. Indeed under the laws

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of Howel Dda, the thief seems to have been dealt with more severely than the murderer.

Murder was expiable by fine. The "galanas" or murder fine, like the saraad, varied with the social rank of the victim; thus the galanas for killing a steward was nine score of silver and nine kine, while that for killing a bondman was one pound. The murder fine is described as having nine "accessories," whereof "the first is, to point out the person to be murdered to the person who is to murder him; and that person is called a Bloody Tongue."

Following the laws relating to the crimes of arson, theft, and murder, are a hundred clauses specifying the worth of wild and tame animals, birds and even insects. That there may be no legal dispute over cases involving damages to these creatures, a price is put upon them as a whole, upon their limbs, eyes, ears, feet, horns, manes, and tails. We read that "the worth of a horse's foot is his full worth"; either of his eyes one-third thereof; while his mane is valued at fourpence, which is the legal value of eight horseshoes with their nails. If a cow's horn was broken, or her tail cut off, the amount of damage the owner could claim for either loss was fourpence. A kid, a lamb, and a pig were each worth a penny at birth, while a foal and a she-calf were valued at fourpence. A cat was of the same value. "The worth of a kitten from the night it is kittened until it shall open its eyes, is a legal penny; and from that time until it shall kill mice, two legal pence." Good dogs were valuable. "A herd dog is worth the best ox, but whosoever may possess a cur, though it be the King, its value is fourpence."

But more than this, the Howellian Code even describes the natural functions of the creatures mentioned, so that if the purchaser of one of them should find his purchase deficient, he might claim a rebate. Thus the functions of the cat are stated as being: "To see, to hear, and to kill mice, to have her claws entire, to rear and not devour her kittens; and if she be bought, and be deficient in any of those teithe (qualities), let one-third of her worth be returned."

The birds and bees are appraised in the same manner and with equal minuteness, and then a price is set upon skins of animals, and trees. Then follow columns appraising the bodily parts of the animal man. We are told that the legal value of a foot, a hand, an eye, an ear, a nose and either of the lips was six kine and six score of silver; while a finger, a toe, or a tooth were worth a cow and two score of silver. "The worth of the tongue itself is equal to the worth of all the other members, because it defends them."

For a broken bone, twenty pence might be claimed, "unless there be a dispute as to its diminutiveness," in which event — mark this — "the doctor is to take a brass basin and to place his elbow on the ground and let the fractured bone fall upon his hand into the basin; and if its sound be heard, let fourpence be paid; and if nothing be heard then nothing is due." Surely we will have to go far to find a law as rich as that, or, for that matter, as this one concerning hair pulling: "The worth of hair plucked from the roots is a penny for every finger used in plucking it out, and two pence for the thumb, and two pence for the hair."

If in the foregoing, evidence of any particular goodness in the old Welsh lawgiver, surnamed the Good, be lacking, read this decree relating to the working of animals: "The driver is to yoke the oxen carefully, so that they be not too tight, nor too loose; and to drive them so as not to break their hearts." Moreover he ruled that neither horses, mares, nor cows were to be put to the plough.

Apropos of ploughing I wonder what our farmers would say to such a law as this: "No one is to undertake the work of a ploughman unless he know how to make a plough and nail it; for he ought to make it

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wholly from the first nail to the last, or from the smallest to the largest." Whether or not there were in those days schools of ploughmanship conferring degrees of B. P. and M. P., I will leave to be discovered by some one else.

With fifty clauses treating of damage to crops and the impounding of cattle, the Proof-Book comes to an end. One quaint extract from the closing section and I have done. "If either a horse or other animal be found with its two fore-feet upon the corn, it is not to be taken, since it was not wholly upon the corn, and part is not the whole." So that if the Welsh farmer should see a trained elephant walking on its fore-feet over his field of young and tender corn, he would have to grin and bear it, or as an alternative, endure without grinning.

So end the laws of Howel the Good, laws which, though many of them seem very peculiar to our modern minds, were undoubtedly adapted to the state of society existing at the time and in the country in which they were made. At any rate, for clearness, for comprehensiveness, and minuteness of detail, they stand unexcelled, if not unequaled in the entire history of law.

DOGS AND THE LAW.

By Roscoe Pound.

IT seems that the common law only took notice of a mastiff, hound, spaniel, and tumbler. But those days are long since passed. To-day courts are compelled to take notice of all sorts and conditions of dogs and all manner of suits arising from their natural delight in barking and biting. The law pertaining to dogs has thus reached considerable bulk, if nothing more, and, considering the increasing number of cases in the reports having dogs for their subject-matter or arising out of the doings of dogs, it is somewhat strange, in this age of text-books, that no one has produced a "compendious treatise" upon the subject. While the profession is waiting for this treatise, I venture a few observations which may be of use to the learned author and serve to help him in filling that portion of his two volumes (there will be two volumes of course) not taken up by the table of contents and the table of cases cited.

In the first place, a few suggestions as to the title. If possible, the word Jurisprudence should find a place in the title. We have Medical Jurisprudence, Dental Jurisprudence, and others of the sort, and I could never see why an author who thought it worth his while to write on the law pertaining to horses, or on the law applicable to farmers, should omit the opportunity of giving us Equine Jurisprudence and Rural Jurisprudence. But perhaps the latter phrase, or Agricultural Jurisprudence, or any equivalent, might be confusing, as suggestive of justices of the peace. At any rate our author must ponder well before he discards Canine Jurisprudence. "Commentaries on Canine Jurisprudence," — how insignificant is "A Treatise on the Law of Dogs" in comparison. A Treatise might possibly be compressed into one volume. Commentaries, never!

Next our author will investigate the historical aspects of the subject. He will examine the laws and customs of the Egyptians, he will quote a few passages from the Digest, and, if possible, from the Twelve Tables. *Cave canem* may be cited as a maxim of Roman Law applicable to mod-

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ern conditions. The barbarous doctrines of the common law which did not make dog-stealing larceny will come in for vigorous invective. A suggestion may be made also by which our author may profit in preparing his historical chapter. We learn from Sir Henry Maine that Canine Jurisprudence had attained such development in old Irish law that a large portion of one of the Brehon Law Tracts is taken up with the law relating to dog-fights and injuries to persons attempting to promote or to put an end to them.

These preliminary matters disposed of, the author will define a dog. He will find it laid down quite generally that a dog is "a thing of value." But this search for judicial definition, for no "modern" text-writer will venture an opinion or definition of his own, will be rewarded much better. The Supreme Court of Indiana,[1] without deciding whether or not dogs are "animals," has ruled that they are "brute creatures and domestic fowls." But note, reader, that the court was construing an act of the legislature, and hence the ordinary meanings of words did not necessarily apply. This decision will go far towards explaining a decision of the Supreme Court of Michigan [2] to the effect that it is no justification for killing a dog that he is found under suspicious circumstances in a hen-house. Surely that is a very proper place for a domestic fowl, if not for all brute creatures.

Our author will also find it laid down that dogs are not persons, and hence that dogs are incapable of being police officers or constables,[3] though animals of less reputed intelligence than the dog have been known to fill higher positions: presumably because they were persons.

Following approved methods of classification, our author will doubtless proceed to consider (1) Rights of Dogs, (2) Duties and Liabilities of Dogs, (3) Duties and Liabilities of Persons Dealing with Dogs. A few suggestions may be made under each head.

A writer has recently given an affirmative answer to the question: "Have animals rights?" and as Austin and others of his close way of thinking, who would scout such a proposition, are growing out of fashion, we may expect our author to maintain through several pages of vigorous rhetoric that dogs have rights, — and therefore that they have legal rights. How these rights are to be enforced, is a serious question which the exigencies of argument may require him to leave unanswered. How far masters are to be regarded as the natural guardians of dogs, and whether the rights of canine litigants should be protected by guardians *ad litem* appointed for the purpose, we are not prepared to say.

The duties and liabilities of dogs are everywhere the subject of legislation. To wear collars, to refrain from running at large, and not to amuse themselves by worrying sheep, are universal requirements. But the common law has something to say under this head. In considering the common law duties of dogs, our author will do well to follow Dr. Watts, whose classification of the propensities of dogs seems to have been confirmed judicially. In this way the duties of dogs may be classified under two heads, (1) to abstain from barking, (2) to abstain from biting. For it has been ruled that the tracking up of freshly painted door-steps by a dog is not actionable.[4] In that case the dog in question was wont to exercise his vocal powers about the premises of the complainant, and in addition to defacing the painted steps invaded the hen-roost, whereupon the owner of the premises brought *quo warranto* with his revolver and executed an ouster. The court ruled that the action did not lie. But *aliter* as to the barking where a dog brought with him divers companions, votaries of

[1] State *v.* Giles, 125 Ind. 154.
[2] Bowers *v.* Horan, 93 Mich. 420.
[3] Heisrodt *v.* Hackett, 3 Cent. Law Journ. 479.

[4] Bowers *v.* Horan, 93 Mich. 420.

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Luna, and led a nocturnal chorus.[5] It would seem that it was the unlawful combination and conspiracy which made the barking especially reprehensible in the latter case. The law appears to recognize a distinction between barking and biting, in that, while biting is always unlawful, — at least where the bitee is human, — barking is not *malum in se*, but only becomes reprehensible when accompanied by circumstances of aggravation, such as the combination and conspiracy just noted, or the frightening of a horse, etc. It seems also that the circumstances of aggravation must grow out of or be closely connected with the barking. It is not enough that they merely accompany the barking. An example of this is the defacement of the freshly painted steps noted above. There the injury did not properly arise out of the barking, nor was it in strictness connected therewith. As the courts of Michigan issue injunctions against the use of profanity, even on one's own premises, the case of the owner of the steps in question would seem to be one of *injuria absque damno.*

In discussing the rights and liabilities of persons having to do with dogs, our author will meet with many interesting questions. In the first place, he will find it laid down that the law has no respect for the characteristics and prejudices of dogs.[6] But this statement must be taken with some qualification, for the same court has held that it is contributory negligence to pull a dog's tail.[7] On the other hand, it is not contributory negligence to offer candy to a dog, nor to step on a dog in the course of a scuffle with "a third party."[8] Nor is it contributory negligence to take a dog by the collar for the purpose of preserving the peace and rescuing a dog "rightfully in the plaintiff's custody."[9] But the court wisely suggest that a great deal must depend in such cases on the size and disposition of the dogs.

In Massachusetts the county is made liable to owners of sheep for damage done to their sheep by dogs, and the county may recover over from the harborers of the dogs. Under this statute a peculiar case arose where the dog of the owner of the sheep conspired with divers dogs of the defendants to worry his master's sheep, and in pursuance of such conspiracy, aided and abetted by the dogs of the defendants, did kill one or more sheep of his master of great value (of course). The defendants were held liable to the county for the damage, the rule being, apparently, that the cussedness of the dog is not to be imputed to his master so as to preclude a recovery for the damage done by his co-conspirators.[10]

Many other points might be noticed. But I trust enough has been said to indicate the field which lies open for some industrious author and enterprising publisher. The profession will wait impatiently for a Treatise on Canine Jurisprudence. I cannot hope for the honor of a dedication, which will be reserved for some eminent occupant of the bench. May I hope that these suggestions will be rewarded by a presentation copy of the two volumes when issued? I fear not, such is human ingratitude, unless I can outdo the regular writers of testimonials and reviews for circular publication, and furnish the enterprising publisher aforesaid *quid pro quo.*

[5] Hubbard *v.* Parsons, 90 Mich. 221.
[6] Boulester *v.* Parsons, 161 Mass. 182.
[7] Raymond *v.* Hodgson, 161 Mass. 184.
[8] Lynch *v.* McNally, 73 N. Y. 347; Fake *v.* Addicks, 45 Minn. 37.
[9] Matterson *v.* Strong, 159 Mass. 497.
[10] Worcester *v.* Ashworth, 160 Mass. 186.

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LONDON LEGAL LETTER.

LONDON, March 7, 1896.

THE sensation of the hour is the trial of Dr. Jameson and the officers who are associated with him as the heroes of the Transvaal raid. Nothing in the way of judicial proceedings could be more amusing to the trans-Atlantic mind than the manner in which the accused have been treated since their embarkation in Africa for the scene of their trial. At each stopping place the utmost endeavors were used to seclude the men from pitying eyes or local observation. When the ship arrived in English waters it lay to for nearly a day in the Channel in order to put the reporters off the scent and to make an unexpected landing at some out-of-the-way port from which the men could be secretly conveyed to London. Thus it happened that after the steamer had called outside Plymouth it was not permitted to any one to go on board, not even the agents of the line or the solicitors who had charge of the defense. Finally, by keeping well out from land, the Thames was secretly entered, and once within the river the men were transferred to a tug, which in turn delivered them up to a police steamer, upon which they were arrested, and upon which they were brought to London. They were taken ashore about dusk and driven to the Bow Street police station to be charged. Altogether it was nearly forty-eight hours that the prisoners were kept in hiding off the coast of England to baffle the curiosity of the public. Had they been accused of some unnatural crime, and, in consequence, were likely to be made the victims of the vengeance of the mob, such police precautions might have been commendable. But as these men are, for the time being at least, social and political heroes, and the most that could have been apprehended was an excess of enthusiasm in the demonstration of welcome which the populace might give them, the manœuvering of the authorities to smuggle them into the country is considered to be simply inexcusable. Had the object of such a policy been to awaken curiosity and evoke enthusiasm instead of to repress it the device would have been admirable. It was the fanfare of trumpets that precedes the procession into the circus ring.

And now that the prisoners have been charged, what is to be done with them? It is a puzzling position, from which the government can extract itself only by diplomacy and legal acumen combined. Jameson, or "Dr. Jim," as he is affectionately called, is nightly cheered to the echo in the music halls and theatres whenever his name is mentioned, and there are few music halls so poor in attractions as not to have a political song in his honor. The scene when he was arraigned at the police station was unique. He arrived with his companions about seven o'clock in the evening, and from the opening of the large court in the morning it had been crowded with conspicuous and distinguished society people and politicians. A number of titled ladies were among those who filled the bench and overflowed into the counsels' seats and jury boxes. Weary with waiting for the curtain to go up, the audience rapped upon the floor with sticks and umbrellas, and when at last the justice and the prisoners entered a cheer was raised which lasted some minutes and which while it lasted drowned all the attempts of the justice and court officials to stop it. Then the information was read. It briefly charges that the prisoners and "certain other persons in the month of December, 1895, in South Africa, within Her Majesty's territory, and without the license of Her Majesty, did unlawfully prepare and fit out a military expedition to proceed against the dominion of a certain friendly state, to wit the South African Republic." The prisoners pleaded not guilty, their arrest was proved, and they were permitted to go out upon their own recognizance and move freely among the very people from whom the government for two or three days had been expending its art and energies to keep them.

There will be a preliminary examination and then a remand, followed by an indictment and a trial, all in the ordinary course, but with this difference: in the ordinary course, and if the offense had not acquired a political character, and the defendants were unknown, the trial would quickly result in punishment. In this case, while it is not for a moment suggested that there will be any laxity on the part of the prosecution or any respect for persons on the part of the courts, the proceedings will move along with the stately deliberation of a popular pageant. The defense will be conducted by no less than three eminent queen's counsel, viz, Sir Edward Clark, Sir Frank Lockwood and Edward Carson, and two juniors, C. F. Gill and Howard Spensby. The prosecution will be in the hands of the Attorney-General and the Solicitor-General. In the natural order of events the trial would take place at the forthcoming term of the Central Criminal Court at the Old Bailey, but as this is a small room and most inconveniently arranged for seeing and hearing, it is probable that it will be transferred by *certiorari*, granted always as a matter of course upon application of the Attorney-General, to the Queen's Bench. There is even talk of having the trial at bar, a method of procedure which has been resorted to only four times within the present century. If, after the trial, a verdict of guilty shall be obtained, the punishment that may be administered will be, at the maximum, two years imprisonment and a fine. Perhaps it is futile to forecast the penalty, but it is not too much to say that the trial will be of imposing interest, considering the importance and station in life of the prisoners, the wealth that can be drawn upon for their defense, the novel law upon which they will be tried, and the grave political consequences involved — both at home and abroad.

There is some consolation in knowing that the steady decline in the common-law business of the courts has been arrested. There were forty-five more actions set down for trial this term than last, and of the five hundred and eighty-eight actions, three hundred and thirty-three are jury cases.

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One of the causes to which this improved state of affairs is attributed is the successful work of the Commercial Court. This court is really a branch of the Queen's Bench Court, and is presided over by one of its judges, generally Mr. Justice Matthews. It was established in order to dispose of purely commercial cases referred to it from the other courts, with a dispatch and celerity that would please business men and attract them back to the courts from their boards of arbitration and compromise. Mr. Justice Matthew was a leading commercial lawyer before he was raised to the bench, and has a great sympathy with litigants and an abhorrence of delays induced by antiquated forms and rules of procedure.

Very little attention is paid to pleading in the commercial courts, and evidence is not hampered by prescribed rule or excluded by technicalities. If the issue is joined with sufficient clearness to enable the judge to ascertain the causes of the dispute he takes the case into his own hands and disposes of it according to his idea of what is right. During the past year of its existence three hundred and ninety-eight causes were referred from the other courts to this court, of which only one hundred and fifty-eight were tried, the remaining two hundred and forty having been compromised. This is considered a proof that a litigant with an uncertain case had rather compromise than meet the judge. STUFF GOWN.

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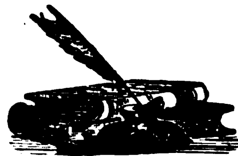
The Lawyer's Easy Chair.



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

∴ ∴ ∴ ∴ ∴ BY IRVING BROWNE. ∴ ∴ ∴ ∴ ∴

CURRENT TOPICS.

THE NEW EDUCATION. — It is apparent that with the opening of the twentieth century some novel ideas of public education will begin to have sway. It has long seemed to many that the scheme of the same education, above the rudimentary branches, for all children without any adaptation to their peculiar tastes, aptitudes and powers, is radically wrong. The common schools and the academies, and to a great degree the colleges, treat the student too much like the Procrustean guest, and stretch him out or chop him off to fit the educational bedstead. The cramming of mathematics into a philosophical or literary mind which abhors them, or the stuffing of elegant letters into a mathematical intellect which despises them, is worse than waste time. How many a sturdy English boy has grown to hate the Greek and Latin classics because of their birch accompaniment, and how many a poetical or philosophical youth has shed tears over a task of figures of mathematics when he would fain be at figures of speech! It is in a great measure due to President Elliot of Harvard University, and his associated college presidents, that the community is becoming impressed with the notion that education should be addressed to drawing out rather than to putting in; to development of powers which are in the student, rather than to the endeavor to treat all as if all were alike in powers, and to stuff them accordingly; to cram the memory rather than to train the faculties. The Easy Chairman heard this idea of the New Education very beautifully explained recently by President Hyde of Bowdoin College. It embraces not only mental training, but to a reasonable extent, physical training. This is but reverting to Plato with his music and gymnastics. It is recommended by these instructors that education should embrace a certain amount of gymnastics of the kind calculated to develop the body without overstraining it or endangering it. Statistics gathered at Wellesley College (for girls) show the great superiority in scholarly standing of those who have pursued the gymnastic course over those who have not, to say nothing of their superior healthfulness. Then attention is to be paid to manual training to some extent — to the teaching of the use of the hands in useful or ornamental occupations. Charles Reade, if living, would insist very loudly on the wisdom of teaching ambi-dexterity, and would very violently denounce the parents and teachers who did not instruct every child how to use both hands indifferently. Gymnastics could of course be taught in the common schools, but special manual training probably could not, at all events for many years to come, nor until the public mind becomes educated up to this high ideal; but perhaps in the course of another generation the public will see the wisdom of teaching in the common schools a certain amount of manual dexterity. In respect to mental training the central idea is to educate the child in that for which he exhibits an aptitude or taste, and not to burden his mind and benumb his faculties with things that he hates and cannot understand. It is the opinion of many that the months and years spent in drilling the feminine mind in mathematics are worse than wasted. What is the use to the average girl of an attempt to gain knowledge of mathematical astronomy? She does not need to know, and generally can never learn how to calculate eclipses. On the other hand, nine-tenths of the pianoforte instruction of young girls is so much time and money wasted, for it does not develop the mental faculties, and it injures the physical powers. When the girl marries it is supplanted by the sewing machine. The pianoforte is the genteel curse of American girl-life. Much better to teach the use of the sewing machine. The plea that it is necessary to teach a child things which he cannot comprehend, and which he merely commits to memory, and utters mechanically like a parrot, in order to "train his mind," is the sheerest nonsense. One might as well set up a race-course for paralytics or cripples in order to develop their physical powers. Some minds are by nature utterly incapable of the higher mathematics, and when such a mind is presented for instruction it is cruelty to bend it to such a course. Mathematics are by no means essential to a lawyer, a clergyman or a physician, and the Easy Chair has hardly ever known one who could do a sum in advanced fractions or

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cube root, while on the other hand, geometry is frequently grateful to such minds, because it is the science of pure logic. One of the most evident deteriorations in modern school training is the disuse of mental arithmetic, to which half a century ago a great deal of attention was given. This is one of the most useful and quickening studies of the old common-school curriculum, teaching the pupil alertness, self-possession and the power of reasoning, and yet it receives very little attention now-a-days. In place of this, teachers of grammar waste precious hours in teaching the new-fangled abstruse rules of grammatical analysis, which tend to make a precisian of the scholar, as they have made a pedant of the instructor, and to drive all vigor and idiom out of the language. Most of the skillful grammar teachers of this time write a very poor style, and very often an ungrammatical style. Grammar is best taught by association with people who speak grammar, and the most skillful analyst under the modern rules will invariably speak bad grammar if he associates with ignorant people. The effort of the new educators is to have the public schools so arranged that if a scholar shows a fondness and talent for a particular branch, he should be afforded an opportunity for gratifying that taste and developing that power, and if he exhibits stupidity in another branch he should not be condemned to pursue it. Growing out of this idea is the call for a modification of examinations. There should be no uniform and inflexible system to which all must conform, but the course of examinations should be modified according to the ascertained tastes, talents, and consequent drill of each scholar. For example, it is absurd to require that every candidate for the Bar must have passed an examination in the higher mathematics or sciences, or that a candidate for the degree of civil engineer must have been found not deficient in the dead tongues or mental philosophy. But the most important modification suggested by the advocates of the New Education is that matters should be so arranged that a bright scholar shall not be restrained to the snail's pace of a stupid one, and that the dull one shall not be overpressed in the endeavor to keep up with the bright one. Great suffering and injustice are worked by the contrary and prevalent system in all schools. The superior mind is bored and depressed, the inferior one is discouraged and dazed. In life's battle they prove about equally successful, leaving out of the account those who have some measure of the genius which books and training do not furnish and cannot much enhance. But with a system of education properly adapted to the different natural powers of the pupils all kinds would be bettered; the uncommon would not be impeded, the common would be encouraged; the one would not be tempted to aim low, the other would be inspired to aim high. There is a vast difference between the best education and the greatest education. Many of the most educated men have dismally failed in life, because their specialty has not been ascertained in the process, and many of the least educated have gained distinguished success because their teachers have had the wisdom to discover their strong points, and to direct their efforts toward educing and developing these. A prominent idea of the New Education is the discouragement of the practice of cramming the memory. The memory is best trained insensibly, and not by subjecting it to great strains. When the Easy Chairman sees a child who can name the sovereigns of England in their order, or recite five hundred verses of Scripture, he feels sad, for he knows that this is not the way to make a historian or a clergyman. All feats of memory should be discountenanced. If the child is properly educated, the memory will take care of itself, for one always remembers what he is interested in.

It is not intended here to depreciate education. Education is useful and necessary, but beyond an elementary point it is not indispensable. It cannot put much into a man, but it may draw much out of him. It cannot make genius. It does not always confer morality. The best thing it can do for any human being, after it has taught him to read, write, spell and cipher, and given him some knowledge of grammar, geography, physiology and geometry, is to stir up in him a taste for reading; in short, to develop the capacity of self-education. Except in technics, how small a part of every man's education is acquired at schools! Those who have done the most marvelous things, and gained the greatest fame, have nearly always been men of imperfect or limited education, in the academical sense. How much was learned in schools by Shakespeare, Michael Angelo, Beethoven, Columbus, Luther, Cromwell, Napoleon, Washington, Lincoln, Marshall? When it comes to discovering worlds, conquering kingdoms, overturning religions, freeing nations from bondage, or establishing new laws, education cuts a small figure. But education is useful for common men, and while they should not be treated as incipient geniuses, yet they should be so trained as to aid and not hamper the genius that possibly may be in them. Nothing is more erroneous and mischievous than for a parent to bring up a child in the notion that he must follow the father's vocation. Some respect should be paid to every strongly expressed preference or keenly evinced talent in the young. In this way the son who is fit for the judicial bench may be promoted from the father's shoemaker's bench, and one who is only fit for a cobbler, may be prevented from botching the administration of justice.

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The Venezuelan Question. — This question, which not only threatens in a measure to raise war between two great nations, but to divide each into two inharmonious sections, is more of a political than of a legal nature, and although the Easy Chair does not deem itself foreclosed from discussing questions that are not legal, yet it bears in mind that it is an Easy Chair, and it does not propose to rock on any one's toes. At the same time it would not have it understood that it is insensible to the pride of country and the calls of patriotism. It believes in the Monroe Doctrine, and so do all other Americans, although they may differ as to its construction and application. One remark on this ticklish topic the Easy Chair will risk, in the belief that no true patriot will dissent: unnecessary war between England and America would be monstrous and wicked, by whichever side provoked, and the side which should refuse peaceable arbitration of any dispute would justly be held accountable in the judgment of the world and of history for all the consequent hatred, disaster, and check of prosperity, which a hundred years would not cure. There is a view of this burning question, however, which is entirely harmless and by no means irritating, and that is the geographical view of it. This is brought to our attention by a discussion of it by a very eminent judge and historical scholar, who at the same time is one of the most distinguished of American geographers — Chief-Justice Daly of New York, whose venerable years, well known moderation, and exceptional acquirement in many branches of scholarship, as well as his indisputable patriotism, entitle his opinions to grave consideration by all Americans, and will not fail to be of weight in other countries. This gentleman has recently treated the question from a geographer's standpoint in the New York Herald, and his views are now simplified and issued in the form of a pamphlet. The conclusions to which Judge Daly comes as a geographer, after a careful examination, are: that the territory claimed by Venezuela was regarded by all cartographers and geographers as belonging to the Dutch for more than half a century before it was ceded by them to the English; that the Schomburgk line, drawn by a surveyor in the employment of Great Britain, has no indisputable sanction; that it would be difficult, if not impossible, for the Commission appointed by the President "to report upon the true divisional line"; that it is possible for arbitrators to say what would be a fair boundary; that "if there was ever a case that should be settled by arbitration, it is this." Whether our country should make war upon Great Britain, in case there should appear to be anything to arbitrate, and of her refusal, he declares must be left to "the sober second thought" of both countries, calling attention to the language of the resolution adopted by the House of Representatives, when the United States were invited by Colombia and Mexico to send delegates to a Congress of Republics, to be held at Panama, for the purpose of making the Monroe Doctrine more effectual, which invitation was declined, upon the ground that "The people of the United States should be left free to act in any crisis in such a manner as their feelings of friendship toward these Republics, and as their own honor and policy may at the time dictate."

NOTES OF CASES.

Lost Property. — A novel case of lost property is Keron *v.* Cashman, N. J. Court of Chancery, which is reported in a recent number of the "New Jersey Law Journal."

"One of a party of five boys found and picked up an old stocking in which something was tied up. He threw it away again and one of the others picked it up and began beating the others with it. It was passed from one to another, and finally, while the second boy was beating another with it, it broke open and was found to contain money. None of the boys had attempted to examine it or had suspected that it contained anything valuable. The father of one of the boys took charge of the money and tried to discover the former owner. Afterwards one of the boys claimed the money and the others a division of it. On a bill of interpleader, it was *held* that the money was not found in a legal sense until the stocking had come into the common possession of all the boys as a plaything, and that it belonged to all of them and must be divided equally between them. Some intention or state of mind with reference to lost property is an essential element to constitute a legal finder, and in this case it is the money and not the stocking to which this state of mind must relate."

The stocking contained $775 in bills. The vice chancellor observed: —

"As a plaything, the stocking with its contents was in the common possession of all the boys, and inasmuch as the discovery of the money resulted from the use of the stocking as a plaything and in the course of the play, the money must be considered as being found by all of them in common. Had the stocking been like a pocket-book, an article generally used for containing money, or had the evidence established that Crawford, the boy who first picked up the stocking, retained it or tried to retain it, for the purpose of examining its contents, or that it had been snatched from him by Cashman, another boy, for the purpose of opening or appropriating the contents himself, and preventing Crawford's examining, I think the original possession or retention of the stocking by Crawford, its original finder, for such purpose of examination, might, perhaps, be considered as the legal 'finding' of the money inclosed with other articles in the stocking. But inasmuch as none of the boys treated the stocking when it was found as anything but a plaything or abandoned article, I am of the opinion that the money within the stocking must be treated as lost property, which was not found, in a legal

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sense, until the stocking was broken open during the play. At that time, and when so found, it was in the possession of all, and all the boys are, therefore, equally finders of the money, and it must be equally divided between them. The case is most peculiar in its circumstances and differs from any of the cases cited by counsel; but the general principles to be applied are stated in the cases cited in 7 Amer. & Eng. Ency. Law, p. 977, and notes. In Durfee *v.* Jones, 11 R. I. 588, 23 Am. Rep. 528, the bailee for sale of a safe, while examining it found a sum of lost money inside the casing, and was held entitled to retain it as finder against the owner of the safe, because the owner never had any conscious possession of the money. All of the cases agree that some intention or state of mind with reference to the lost property is an essential element to constitute a legal finder of such property."

THE "GENERAL WELFARE" CLAUSE.— This very elastic phrase in the Federal Constitution has received a fresh elongation by the decision of the United States Supreme Court, in United States *v.* Gettysburg Electric Ry. Co., in January last, reversing the court below, and holding that Congress may condemn the site of the battle of Gettysburg, for the purpose of preserving it and erecting monuments and tablets to indicate the positions of the various military bodies at the battle. Mr. Justice Peckham waxed unusually sentimental as follows: —

"The end to be attained, by this proposed use, as provided for by the act of Congress, is legitimate, and lies within the scope of the Constitution. The battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery and, indeed, heroism, displayed by both contending forces, rank with the highest exhibition of those qualities ever made by man. The importance of the issue involved in the contest of which this great battle was a part cannot be overestimated. The existence of the government itself, and the perpetuity of our institutions, depended upon the result. Valuable lessons in the art of war can now be learned from an examination of this great battlefield, in connection with the history of the events which there took place. Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of battle, in the name and for the benefit of all the citizens of the country, for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. It would be a great object-lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in Congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country, the greater is the dependence properly to be placed upon him for their defense in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country, which were saved at this enormous expenditure of life and property, ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public expense. The right to take land for cemeteries for the burial of the deceased soldiers of the country rests on the same footing, and is connected with, and springs from, the same powers of the Constitution. It seems very clear that the government has the right to bury its own soldiers, and to see to it that their graves shall not remain unknown or unhonored. No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of these powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred."

This is undoubtedly the greatest strain to which the Federal power of acquisition has been put. The ground cannot answer any visible purpose of military education, and it is not necessary to use all the land for a cemetery, and it is no part of the purpose of the government to give "object lessons," or any other form of inculcation in patriotism; and yet it would seem ungracious and unpatriotic to criticise the decision or the earnest words in which it is embodied. It may well be doubted that the framers of the Constitution would have dreamed that the site of Bunker Hill could be taken away from its owners, and the public money appropriated to preserving and beautifying it as a national park. We do not find fault with the decision. We are glad that the Court were able to find the law so susceptible to emotional and sentimental influences; but on the reasoning of the learned justice it is difficult to see why the public money might not be appropriated to the erection of commemorative monuments all over the country. One to Columbus might be in order. But the money is better spent than for Congressional junketings in the guise of funerals and for improvements of muddy creeks.

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The Green Bag.

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

LEGAL ANTIQUITIES.

COURTS OF TRAILBASTON (quick as your stick) were instituted by Edward I, in order that justice might follow complaint as swiftly as you could trail a club, but owing to numerous errors and repeated appeals, these courts came to end, by general consent, in the reign of Richard II.

FACETIAE.

A LAWYER had been questioning the witness for some time, and at last got him down to personalities.

"Did I understand you to say, sir, that the defendant made certain remarks about me?"

"I said so, sir."

"Ah! Well now, sir, from what you knew of me, do you believe those remarks to be true?"

"No, sir, I do not."

"Very well. Now, will you be good enough to state to the Court what he did say?"

"Yes, sir. He said he thought you were a truthful and honest man, and ——"

"You may step down, sir. That's enough."

A YOUNG lawyer named Hovey was at one time located at Independence, Mo. He went to the house of a friend one day to make a call. An old colored woman appeared at the door, of whom he asked if her master and mistress were at home. On being told they were absent, he said: "Tell your master and mistress that J. Hovey, attorney-at-law, called to see them." The old servant looked at him with amazement, as if unable to believe her own eyes. That evening she exclaimed: "Missus, what do you think! *Jehovah the Eternal Lord,* was here to see you to-day."

NOTES.

LORD BROUGHAM said he remembered a case wherein Lord Eldon referred it in succession to three courts to decide what a particular document was. The Court of King's Bench decided it was a lease in fee; the Common Pleas, that it was a lease in tail: the Exchequer, that it was a lease for years. Whereupon Lord Eldon, when it came back to him, decided for himself that it was no lease at all.

SEVENTY years ago, no lawyer was better known to all the courts of the Eastern States than Elisha Williams. He was given to uttering startling periods. For instance, in arguing against a will made by a nonogenarian, he exclaimed: "Man's bounds of life are fixed to three score and ten, which superior strength may lengthen to fourscore. But shall a will be made by a man who has outlived God's Statute of Limitations?"

THE London correspondent of the *Scottish Law Review* says: —

"It seems that two of the members of the commission which the American government is appointing to inquire into the case in order to help Lord Salisbury out of his Venezuelan difficulties are two lawyers fairly well known here, Mr. Phelps and Mr. Justice Harlan of the United States Supreme Court. The former I first saw seated by Sir Frederick Pollock, who was lecturing to the students of the Inns of Court, and he spoke to them with that air of easy but accentuated *sang froid* which is perhaps a mark of the higher more than of the lower classes, judging from the ebullitions of excitement we have been recently witnessing. I can hardly tell why, but he left on me a decided impression of the figure of Lord Dundreary in pictures of Sothern I have seen. It will be remembered that he was one of the counsel for the States in the Behring Sea arbitration, and very ably represented their case on that side of it which consisted of 'the law of nature and right reason' — a point of view so congenial to the American's expansive temperament.

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"Mr. Justice Harlan, about whom less is known than of Mr. Phelps, who, at the time I mentioned and for several years after, was the American minister or ambassador, is a man of much more distinguished appearance. When I saw him he was on his way through to Paris to sit at the same arbitration, and he took advantage of being in London to spend a portion of a day in hearing the late Lord Coleridge trying special jury cases. Altogether, he was the finest specimen physically of any man-American I ever saw, and more closely resembled the typical English gentleman of mature age than the American."

LITERARY NOTICES.

WITH the March issue, the ATLANTIC MONTHLY begins two important series of papers. "The Irish in American Life," by H. C. Merwin, is the first of the promised articles on "Race Characteristics in American Life." Readers of the ATLANTIC will recall Mr. Merwin's papers on Tammany Hall, which created so much interest at the time of their publication. Under the general heading "The Case of the Public School," the ATLANTIC will discuss the payment and standing of teachers throughout the country. Over ten thousand teachers have been requested to contribute information as the basis of these papers. The first appearing in this issue is by G. Stanley Hall, president of Clark University, Worcester, Mass. "The Presidency and Secretary Morton" is the second paper in the series of political studies, the first of which, upon "The Presidency and Mr. Reed," appeared in the February issue.

As President Andrew's great History serial in SCRIBNER'S MAGAZINE draws to a conclusion, the very entertaining quality of it, which has been generally acclaimed, is intensified. The March installment contains a pictorial record also that is unique in magazine illustration, giving thirty-five pictures in one article — including original and very artistic views of the World's Fair, reproduced in pen drawings of unusual beauty. The Homestead riots and the Tennessee convict troubles are also fully illustrated from instantaneous photographs. The text gives, among other striking passages, an interesting summary of the marvelous advance made by electricity in recent years.

THE March ARENA contains a magnificently illustrated paper written by Justice Walter Clark, LL.D., of the Supreme Bench of North Carolina, on "Mexico in Mid-Winter." Incidentally the able jurist discusses the silver question as it was brought to his attention during his recently extensive trip throughout our sister republic under the auspices of THE ARENA.

A PRACTICAL and thoroughly comprehensive discussion of "Our Foreign Trade and Our Consular Service" is contributed to the March number of the NORTH AMERICAN REVIEW by Charles Dudley Warner. As a strong incentive to an increasing foreign trade, Mr. Warner advocates the establishment of a permanent systemized consular service with promotion for ability to important positions, according to fitness. Under the heading of "The Excise Question" two carefully-prepared papers are presented. The first by the Hon. Warner Miller, who earnestly asks "What Shall We Do with the Excise Question?" and the second by the Right Reverend Wm. Cogswell Doane, Bishop of Albany, who writes upon "Liquor and Law."

IN McCLURE'S MAGAZINE for March is brought to light a speech of 1837 by Abraham Lincoln, which the biographers, until now, seemingly have known nothing of, though it contains passages still of the highest interest. For example, of politicians, Lincoln says: "A set of men who have interests aside from the interests of the people, and who, to say the most of them, are, taken as a mass, at least one long step removed from honest men. I say this with the greater freedom, because, being a politician myself, none can regard it as personal." There are also an amusingly judicious love proposal of Lincoln's, and some lively reminiscences of him as the leader in a successful manœuvre to establish the State capital at Springfield, and as a young lawyer in that smart new town. The pictures are numerous, and include four portraits of Lincoln.

THE March number of CURRENT LITERATURE is a marvel; it contains one hundred and three prose articles and thirty-nine poems. Mere figures do not show value, but every prose article and every poem in the number is well worth reading. The opening department contains three strong editorials on "Drink in the Public Schools," "The Way of the Reformer," and "The Genealogy of Scientific Discovery." Among other important articles are "Visitors at the Gunnel Rock," a delightful story by Arthur Quiller Couch; "Chonita's Surrender," a dramatic reading from Mrs. Atherton's novel "The Doomswoman"; "In the Dead Valley," a ghost story by Ralph Adams Cram; "Forgotten Meanings," by Alfred Waites; "Warfare of the Future," by Rene Bach; "Heine's Last Years," by Benjamin

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W. Wells; "Beauty in Illustration," by Rev. Walter Baxendale; "Bismarck's Table Talk," by Charles Lowe; a page of Love Poems selected by Fanny Mack Lothrop, the popular compiler; and "The Conquest of Obstacles," by Orison Swett Marden. So carefully planned and edited is CURRENT LITERATURE that it seems each month not only to keep one thoroughly abreast of all current thought, but to run the gamut of all the emotions and to have something for every member of the family and for every taste.

MR. DAVID A. WELLS continues his account of "Taxation in Literature and History" in APPLETON'S POPULAR SCIENCE MONTHLY for March, giving methods employed for raising revenue in ancient Greece and Rome. Under the title "The Failure of Scientific Materialism" this doctrine is sharply attacked by Prof. Wilhelm Ostwald, of Leipsic, who affirms that it should be replaced by a theory based on energy. Herbert Spencer contributes to this number a chapter on the Painter in his series on "Professional Institutions," Prof. E. W. Hilgard shows that the salts in our alkali lands consist largely of plant-food, and tells what means may be used to neutralize the harmful constituents. "Exercise as a Remedy" is discussed by Henry Ling Taylor, M. D., who shows how potent a curative agent exercise may be when carefully prescribed, and how injurious it may be in some cases.

DURING these months of extraordinary unrest in foreign politics, the REVIEW OF REVIEWS devotes its attention in large measure to international affairs. Its editorial department discusses matters in South Africa, the attitude of the great European powers, and the most recent phases of the movement among the nations for the arbitration of disputes; the March number also contains a most timely article on "The Government of France and Its Recent Changes," by Baron Pierre de Coubertin; "A Review of Canadian Affairs" by J. W. Russell, and a character sketch of "Cecil Rhodes of Africa," by W. T. Stead.

THE CENTURY continues to expend the full resources of its art upon the illustration of the "Life of Napoleon," and the March installment presents a particularly beautiful array of artistic illustrations carefully studied from historical data, costumes, uniforms, etc. These include sketches of "The Favorite Occupation of the Empress" by Grivaz, "Napoleon Dictating to His Secretaries" by Grolleron, "Meeting of Napoleon and Tolstoi in Paris" by Boutigny, "The Arrest of Ferdinand" by Rossi, and three by Orange, "The French Army, under Junot, in the Mountains of Portugal," "Godoy Taken into Custody by the Spanish Troops," and "The Burning of a Palace of Godoy by the Populace at Madrid." All of these are made specially for this work. In addition there are reproductions of Regnault's "Marriage of Prince Jerome Bonaparte and Princess Frederica Catherine of Würtemberg," a portrait of the Princess from the painting by Gérard, a portrait of Caulaincourt by Gérard, and a portrait of Junot, beautifully engraved by Johnson.

BOOK NOTICES.

LAW.

THE WORKS OF JAMES WILSON, associate justice of the Supreme Court of the United States, and Professor of Law in the College of Philadelphia. Being his Public Discourse upon Jurisprudence and the Political Science, including Lectures as Professor of Law, 1790-2. Edited by JAMES DEWITT ANDREWS. Callaghan & Co., Chicago, 1896. Two vols. Cloth, $7.00. Sheep, $8.00.

It is strange that no reprint has ever before been made of this admirable work, the first edition of which appeared in 1804. Messrs. Callaghan & Co. deserve the sincere thanks of the legal profession and all students of political science for rescuing from unmerited oblivion this treatise, which is certainly one of the ablest and most scientific ever written upon the subject of law and government. Mr. Wilson's work is, in fact, a legal classic; one which will be read with delight and with profound admiration for the thorough and logical manner with which the distinguished author goes to the very root of the questions considered. Our forefathers, indeed, were, as a rule, profounder thinkers and more logical reasoners than the men of the present day, and their works stand the test of years.

The first volume is made up of a scientific treatment of general principles historically considered, and also applied to our law, or strictly jurisprudence, the science of law.

Municipal law, or the law of a particular country, viz, the United States, is the theme of Volume II. This volume opens the scientific treatment of our Constitution, beginning with the legislative department, which is minutely examined. The subjects, as noted in the Table of Contents, are each examined with a care and minuteness which characterizes all the writings of this eminent man. The Appendix to each of the volumes deserves particular attention. "The Considerations upon the Bank of North America" is certainly one of the greatest constitutional arguments extant. The Appendix to Volume II has, first, an

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examination of the legislative authority of Parliament, published in August, 1774. It contains the language, "All men are by nature equal and free," language almost identical with that of the Declaration of Independence. The speech in vindication of the colonies, in January, 1775, contains much of the same matter afterwards found in the Declaration of Independence.

The aim of the editorial work has been to re-enforce the text upon questions which were unsettled, by authorities showing how the questions were settled. To show briefly the development of principles. To bring out the fundamental principles of our law. To show the present tendency in important questions which are influencing the structure of our law.

The notes are universally brief. Sometimes a mere reference serves to place in the hands of the reader the means of an exhaustive examination.

A feature of the original work is of especial value. Many lecturers of note omit the citation of authority. Judge Wilson constantly gives reference to authority, thus enabling the reader to judge the correctness of the conclusions and extend the research. This also shows the care and extent of the original investigation.

We are sure this great work will receive the consideration and approbation to which its merits entitle it.

THE GENERAL PRINCIPLES OF THE AMERICAN LAW OF THE SALE OF GOODS. In the form of Rules with Comments and Illustrations. By REUBEN M. BENJAMIN. The Bowen-Merrill Co., Indianapolis and Kansas City, 1896. Law sheep. $3.00 net.

Mr. Benjamin makes quite clear the principles governing the Law of Contracts by the means of a series of rules accompanied by illustrative cases. The book should be a useful one to law students, for whom it is designed.

THE WOMAN'S MANUAL OF PARLIAMENTARY LAW, with practical illustrations. Especially adapted to Women's Organizations. By HARRIETTE R. SHATTUCK, President of the Boston Political Class. Sixth Edition, Revised and Enlarged. Lee & Shepard, Boston, 1896. Cloth. 75 cents.

The thousands of women who are organizing clubs, etc., will find this little book of much assistance. Parliamentary principles and rules are made so clear that the most inexperienced person cannot fail to understand them.

A MANUAL OF ELEMENTARY LAW. Being a summary of the well-settled principles of American Law. By WILLIAM P. FISHBACK, dean of the Indiana Law School. The Bowen-Merrill Co., Indianapolis and Kansas City, 1896. Law Sheep. $3.00 net.

An excellent statement of the principles of law. *Multum in parvo* might well be its motto, for certainly a vast amount of information is condensed into the least possible space. Students, especially, will appreciate the work.

TEXT-BOOK OF THE PATENT LAWS of the United States of America. By ALBERT H. WALKER of the Hartford Bar. Third Edition. Baker, Voorhis & Co., New York, 1895. Law sheep. $6.50 net.

For a terse, lucid, and at the same time comprehensive statement of the American patent law, we know of no work that equals this treatise by Mr. Walker. This new edition is carefully revised and enlarged, and is an accurate presentment of the law at the present time. The volume is an absolute necessity to all patent lawyers.

MISCELLANEOUS.

THE PARSON'S PROXY. By KATE W. HAMILTON. Houghton, Mifflin & Co., Boston and New York, 1896. Cloth. $1.25.

While the plot of this story is improbable, almost to absurdity, the author has succeeded in throwing such an atmosphere of realism about it that the reader takes the extraordinary doings of the hero as matters of course. The book is exceedingly interesting, and one is loth to lay it down until the end is reached. The characters are all strongly drawn and the story well written.

JOAN OF ARC. By FRANCIS C. LOWELL. Houghton, Mifflin & Co., Boston and New York, 1896. Cloth. $2.00.

The legendary accounts of Joan of Arc have so impressed the general reader, that it is difficult to think of her as a real, human woman. Her life, as the author says, affords a striking illustration of two important historical principles: first, that legends require the shortest possible time for their luxuriant growth; and second, that the wildest and most improbable legends may exist beside the most definite and well ascertained historical facts. The facts of the real life of the Maid of Orleans are known to a somewhat remarkable degree of certainty, and these facts Mr. Lowell presents to his readers in a very interesting manner. The real story of this remarkable girl is even more absorbing than the legendary. The book is in every way a valuable contribution to biographical literature.

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Nichs Hill Jr.

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The Green Bag.

VOL. VIII. No. 5. BOSTON. MAY, 1896.

NICHOLAS HILL.

BY HON. MATTHEW HALE.

"SUCH is the evanescence of a great lawyer's fame, that some of your readers may not have heard of Nicholas Hill."

So Mr. Grosvenor P. Lowrey wrote in his article on John K. Porter, in the GREEN BAG for August, 1892.

Mr. Lowrey's remark is doubtless true. No better illustration of the "evanescence of a great lawyer's fame" can be found than the case of Nicholas Hill. When he died less than forty years ago (May 1, 1859), he was generally considered as the first lawyer in the State of New York. In the language of the committee of the Bar of the City of New York which prepared a memorial of his life and services, "It is not too much to say that by the common consent of the Bar, Mr. Hill stood foremost among the first." Mr. Justice Nelson, then of the Supreme Court of the United States, who presided at the Bar meeting held in New York City on the occasion of his death, said: "I have known Mr. Hill ever since he came into the profession, and have witnessed his advance in distinction until he had reached and stood in the very front rank of the Bar of New York."

Mr. Charles O'Conor said at the same meeting, "When summoned from earth, though he had only attained his fifty-third year, he held confessedly the first place at our Bar." Similar words were spoken and written by many of his contemporaries who knew him well, and were acquainted not only with his professional, but with his private life; and still it may well be doubted whether even in this, the city where the greater part of his professional work was done, and where he died, a majority of the younger members of the legal profession, if not quite in the condition described by Mr. Lowrey, are not without anything but the vaguest impressions of his professional standing and labors. His full-length portrait hangs in the State Capitol, with those of Abraham Van Vechten, Daniel Cady and others. Seven volumes of reports bear witness to his industry, acuteness and learning, as do also his reported briefs in many of the cases which he argued in the highest courts of the State. But the memory of the great lawyer has faded away. But few are left who knew him personally; and but little information respecting him is accessible to the public, or even to the ordinary professional reader. His character, labors, and services to the profession were such, however, as to justify an attempt on the part of the writer to revive his memory in this generation, in the hope that others having more time and better opportunities for collecting facts, may perform more thoroughly and fully the biographical work which his eminence as a lawyer would seem to warrant and require.

Nicholas Hill, the son of Rev. Nicholas Hill, was born in Florida, Montgomery County, New York, in the year 1805. His great-grandfather, Adam Hill, was born in the County of Derry, Ireland, and died at Schenectady, New York, December 10, 1764. Nicholas Hill, Senior, was the eldest son of Henry Hill, who was the son of Adam Hill. He seems to have been a remarkable

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man. When he was only ten years old, he with his brother Henry, who was only eight, left their home and enlisted as drummer boys in the Revolutionary army at Albany. His original discharge, signed by General Washington and now in the possession of the daughter of the subject of this sketch, states the fact that on the eighth day of June, 1783, Nicholas Hill, sergeant in the First New York Regiment, "having faithfully served the United States for five years, and enlisted for the war only, is hereby discharged from the American Army." At the foot of this discharge is a memorandum signed by Cornelius Van Dyck, Lieutenant-Colonel, that the above sergeant Nicholas Hill has been honored with the badge of merit for five years' faithful service. Endorsed upon the paper in Mr. Hill's handwriting is the following: "My captain's name was Benjamin Hicks, Nicholas Hill." This discharge would indicate that Mr. Hill's connection with the army began in 1778, as five years from the date of discharge would only take the service back to that year, but the theory of Mr. John L. Hill of New York, the youngest child of Nicholas Hill, Sr., is that the term of years spoken of in the discharge is not exact. He says his father always spoke of his term of service as nearly seven years, and that he used to say that his enlistment was when he was only ten years old, and that it was in the winter of 1776. He was born in December, 1766. Mr. John L. Hill is of the opinion that his father and uncle, being then mere children, went to Capt. Hicks's company at the time indicated during the winter of 1776–7, and that, perhaps, on account of their youth, they were not enrolled as members of the company until 1778, although before enrollment permitted to play the fife or beat the drum in the company. However this may be, there can be no doubt that from the age of twelve to that of seventeen, Nicholas Hill, Sr., was an enlisted soldier in the American Army.

Mr. Hill, Sr., afterwards became a Methodist minister. He is said to have been "a man of great physical strength, of great force of character, stern in principle, pure in purpose, simple, yet impressively eloquent and earnest." He had four wives, by each of whom he had children. The subject of this sketch, Nicholas Hill, Jr., was the ninth and youngest child of his first wife, whose maiden name was Anna Newkirk. She died in 1810. The youngest son of Nicholas Hill, Sr., the only child of his fourth wife, John L. Hill, Esq., is now a prominent lawyer in New York City. He was the eighteenth child of Rev. Nicholas Hill, and to him the writer of this sketch is indebted for many of the facts above mentioned relating to the Hill family. Rev. Nicholas Hill died in 1856, at the advanced age of ninety, his son Nicholas surviving him only about three years.

Nicholas Hill, Jr., left his home at an early age to carve his own fortune. He maintained himself by teaching school, surveying farms, and similar labors while he studied law, first in Montgomery, and afterwards in Schoharie County, until in August, 1829, he was admitted to the Bar, and entered into partnership with Deodatus Wright, then of Amsterdam, N. Y., afterwards of Albany, and for a time justice of the N. Y. Supreme Court. Shortly afterwards, Judge Esek Cowen of Saratoga, who was engaged in the preparation of notes to Phillips on Evidence, associated Mr. Hill with him. This work, commonly cited as Cowen & Hill's Notes, is one of great erudition. Mr. O'Conor in his remarks at the meeting of the Bar above referred to, refers to it as a "gigantic task" of which he says Mr. Hill performed a large part. He also says that "whole libraries were taken up and their contents reproduced in a form the most useful to the Bench and the practitioner that could have been devised." The work had been commenced and considerable progress made therein by Judge Cowen before Mr.

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Hill became associated with him. Stephen P. Nash, Esq., of New York, who was a student in Judge Cowen's office at the time, testifies that this period of his life was "one of incessant, laborious and faithful industry." The work itself, although for many years very frequently cited and much used, especially in the State of New York, in the accumulation of modern books has gone to a great extent out of general use, but it is even yet of great practical value, fully and thoroughly discussing many branches of the law coming properly under the head of evidence, and digesting with great faithfulness and accuracy the cases both in England and in this country, bearing upon the questions involved.

This work was published in 1839. The completion of it was interrupted by Mr. Hill's professional labors, as he had some years previously opened an office at Saratoga, which at that time was quite a center of legal activity, being the home of Judge Cowen, Chancellor Walworth and Judge Willard.

In the summer of 1839, Mr. Hill was retained in the then celebrated case of People ex rel. Barry *v.* Mercein (8 Paige, 47, 3 Hill, 399, 15 Wend. 64, 83). The case involved the question of the custody of an infant child as between the claims of a father and a mother who had separated. Mr. James W. Gerard, who was Mr. Hill's opponent in this case, said at the Bar meeting above referred to, that "the zeal, intelligence and legal knowledge which he evinced on that occasion first brought him into public notice, and laid the foundation of his future fame." He says that "Mr. Hill, representing the father, had thoroughly stored his mind with all the book-learning of the common law of England, and piled his authorities one upon the other, mountain high, in favor of the father's paramount claim to the custody of his child." The decision of Chancellor Walworth was in favor of the mother. A decision was afterwards rendered, however, by the Supreme Court (3 Hill, 399), awarding the custody of the child to the father.

While Mr. Hill resided in Saratoga Springs, he was, in September, 1836, appointed by the Court of General Sessions, District Attorney of Saratoga County, which office he held, however, but a few months, resigning it in April, 1837. While still in Saratoga, he was appointed State Reporter, and after the preparation at Saratoga of one or two volumes of his reports, removed to Albany with Sidney J. Cowen, the son of Judge Cowen. He held the office of State Reporter from 1840 until 1845, when he resigned this office. He issued seven volumes of reports of the decisions of the Court of Errors and the Supreme Court. The following remarks of Mr. Nash, at the Bar meeting to which reference has already been made, contain a just and fair representation of Mr. Hill's work in the preparation of these reports: —

"In preparing the cases for the press, he labored to compress the statements of fact into the smallest space, and removed from the opinions of the judges such details as his own narrative rendered superfluous. He spent hours in condensing and remodeling the syllabus or head-note, till it should succinctly, clearly and accurately express the very point of the decision, and frequently added valuable discussions on kindred topics suggested by the reported case.

"His reports have been very generally considered as models in every respect. No copyright price per volume could tempt him to swell their number, to heap into them masses of mere print, or to do his work hurriedly or negligently. They will bear the most rigid scrutiny as specimens of honest, faithful book-making."

Judge Cowen's law library was considered, during his life, one of the largest and best in the country. It was designed to be complete in English and American reports, and also contained a full line of valuable text-

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books. Mr. Sidney J. Cowen brought this library with him to Albany, and Mr. Hill had the use and enjoyment of it during Mr. Cowen's life; but not long after their removal to Albany, Mr. Cowen, died. His father, Judge Esek Cowen, died in 1844. After the death of the son, it became necessary in the settlement of his estate, to sell this library. It was bought by Peter Cagger, Esq., who had just then dissolved a long connection with the distinguished lawyer Samuel Stevens. That library constituted one of the inducements that led to Mr. Hill's partnership with Mr. Cowen. Prior to this time, and after Mr. Cowen's death, he had been associated with Deodatus Wright and with Stephen P. Nash; but that association was dissolved, and on the termination of his office as State Reporter, he entered into partnership with Peter Cagger, and soon afterwards Hon. John K. Porter became a member of the firm, which for many years commanded a large and extensive practice in Albany, under the name of Hill, Cagger & Porter. By this arrangement Mr. Hill was enabled to continue in the enjoyment of the books which had so long been his companions, and that library, until the end of his life, was, in one sense, Mr. Hill's home. There he spent a great portion of his time both by day and by night, and it was doubtless owing to overwork among these books that his life was cut short at an age when he ought to have had many years remaining for work in his profession. While on this subject, it may be well to trace the history of this library down to the present time. After Mr. Hill's death, Mr. Porter was elected judge of the Court of Appeals, which office he resigned after a few years, and went to the City of New York, where he became the senior member of Porter, Lowrey, Soren & Stone, a firm which enjoyed a large and lucrative practice in that city. After Judge Porter left Mr. Cagger, Samuel Hand, afterwards judge of the Court of Appeals, became a partner of Mr. Cagger, and the library remained in the office of Cagger & Hand. In 1868, Mr. Cagger, while driving with John E. Devlin, Esq., in Central Park, in the City of New York, during a session of the Democratic National Convention which nominated Horatio Seymour for President, was thrown from the buggy in which they were seated, and, striking his head upon a stone, was instantly killed. In the autumn of that year, Mr. Hand associated with himself Matthew Hale and Nathan Swartz, under the firm name of Hand, Hale & Swartz. Afterwards Charles S. Fairchild, who was later Attorney-General of the State, and still later a member of President Cleveland's Cabinet, as Secretary of the Treasury, became a member of the firm, which was continued under the name of Hand, Hale, Swartz & Fairchild. Mr. Fairchild, when elected Attorney-General in 1875, retired from the firm, and Mr. Swartz died in 1878, and the firm was continued for some time under the name of Hand & Hale, and Hand, Hale & Bulkeley. The Cowen library, as increased by accumulations from year to year, remained in the ownership and possession of these various firms. Mr. Hand was appointed by Governor Robinson as Judge of the Court of Appeals in place of judge Allen, deceased, and served a few months in the year 1878. In 1881 the firm was broken up, Judge Hand continuing practice by himself mainly in the Court of Appeals, and retaining the old Cowen library with the additions thereto. Judge Hand died in 1886, leaving this library to his son, Billings Learned Hand, then a minor, now in the senior class of the Harvard Law School, who is now the owner of this library, which is still one of the largest and most complete private law libraries in the State of New York.

Mr. Hill never held any public offices except the two already referred to, namely, that of District Attorney of Saratoga County, and New York State Reporter. He was

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never an aspirant for office, and was only interested in politics so far as questions of principle were involved. He was always a man of great public spirit, having inherited from his father a strong sentiment of patriotism which nothing ever diminished.

No collection of Mr. Hill's briefs or opinions has ever been published. The library which has been already mentioned, and which is now the property of Mr. Hand, contains many such briefs and opinions bound up with cases in the manner usual with practicing lawyers who are in the habit of arguing cases on appeal. The opinions to which reference is made were such as were written in his private practice. His judgment in legal matters was so highly appreciated that he was often called upon for his professional opinion. In the volumes of his reports are many notes of great value, which illustrate the clearness of his mind, and the thoroughness of his research. As an example, reference is made to the note on the writ of habeas corpus contained in 3 Hill, page 647 and following pages, which constitutes a complete treatise on the subject under the statutes of the State of New York, as well as at the common law, citing decisions up to that date (1842). From the time of his resignation of the State Reportership in 1844 up to the date of his death in 1859, Mr. Hill's practice was mainly confined to the argument of causes on appeal. During this period he probably argued a greater proportion of causes in the Court of Appeals than any other counsel. Indeed, it may safely be stated that no lawyer in the State of New York before or since (with the exception perhaps of Judge Samuel Hand), has during the same length of time taken part in so many arguments in the highest appellate court of the State. At that time, country lawyers and lawyers in the city of New York were not generally in the habit of going to Albany to argue their own cases in the Court of Appeals or in the Supreme Court.

There were a few leading lawyers in Albany, like Samuel Stevens, Marcus T. Reynolds, and afterwards Nicholas Hill and John H. Reynolds and some others, who were most usually retained by lawyers in other parts of the State to argue their cases on appeal. Among these, without any disparagement of the others, it may truly be said that Mr. Hill was chief. He was noted for the keenness of his analysis, the clearness and conciseness of his statements both of fact and law, and the excellence of his judgment, which enabled him to discuss fully the material points in a case, without wasting his time or energy upon minor and unimportant considerations. Perhaps no lawyer in the State of New York has ever had so happy a faculty of condensation, without sacrificing any point. This was, of course, to a great extent, owing to the possession of a keen discriminating intellect; but it could never have been accomplished unless such intellect had been united with indomitable industry. He loved his profession as few men in this country have ever loved it; but it is the testimony of his cotemporaries who knew him well that, while his life was devoted to his profession, to the detriment of his health and the shortening of his life, he had many tastes outside of the law. Again, to quote Mr. Nash, who knew him well, "he was familiar with the best English literature, and a lover of good books; and when he could throw off the thoughts of his work, he was a most delightful and congenial companion. His tastes were refined, his sensibilities lively and delicate, his nature frank and without guile, his heart warm and true." And he says, "For myself, I can never forget how much I am indebted to him for example, guidance, encouragement, nor the unfailing kindness which in boyhood and ever afterwards I always received from him."

A sketch of Nicholas Hill would be entirely inadequate without some reference to his briefs and arguments, for it was to these,

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many of which were published in the current volumes of reports, and were read by the profession throughout the State of New York, and probably extensively throughout the country, that he mainly owed his great reputation at the bar. The brief in Silsbury *v.* McCoon (3 N. Y. 379) is one of the most noteworthy, and is given with considerable fullness in a note to the report. The proposition established in that case was, that where a quantity of corn was taken from the owner by a willful trespasser, and converted by him into whiskey, the property was not changed, and that the whiskey belonged to the owner of the original material, and that a creditor having an execution against the owner of the corn might seize the whiskey and sell it to satisfy his debt. In his argument in this case, where he succeeded in reversing the judgment of the Supreme Court, Mr. Hill thoroughly and clearly explained the provisions of the civil law relating to this question, and argued that the common law did not differ from the civil law, where the confusion of goods had been the result of a wrongful design and intent, and was not merely from negligence or inadvertence. Mr. Hill in his brief says that the civil law from which the common law on this subject was derived, made a plain distinction between *bona fide* and fraudulent accession, holding that no title could in any case be obtained by the latter; that this is a principle of the common law, having been adopted along with the general law of accession, and expressly recognized by various common law decisions; and he contended that the arguments against it were founded on views not sanctioned by the common law.

In this case, the Court of Appeals, by a vote of five to two, reversed the judgment of the Supreme Court and sustained Mr. Hill's position. A dissenting opinion was written by Chief-Judge Bronson, who as justice of the Supreme Court delivered the opinion of that court, which was under review. It may be remarked that at that time judges in the State of New York were allowed to sit in review of their own decisions; a practice which was prohibited by the new judiciary article adopted in 1870, and since that time has not been allowed. The case was twice argued in the Court of Appeals by Mr. Hill, the judges on the first argument being equally divided in opinion.

Thomas *v.* Winchester (6 N. Y. 396) is another case in which Mr. Hill, as counsel for the respondents, succeeded in sustaining a judgment of the Supreme Court establishing a principle which is now well settled and familiar. In that case, the defendants were engaged in putting up and vending vegetable extracts in the city of New York. Among the extracts so prepared and sold by them were those known respectively as the extract of dandelion, and the extract of belladonna, the former a mild and harmless medicine, and the latter a vegetable poison which, if taken as a medicine in such quantity as might be safely administered of the former, would destroy the life or seriously impair the health of a person to whom the same might be administered. The defendants sold a jar of the extract of belladonna, which had been labeled by them as the extract of dandelion, to one Aspinwall, who afterwards sold it to one Foord, a druggist in Cazenovia, of whom the plaintiff, Mrs. Thomas, bought it, and believing it to be the extract of dandelion which had been prescribed for her by her physician, took it, and was very greatly injured in health. The complaint averred that the injury was caused by the negligence and unskillfulness of the defendant in putting up and falsely labeling the jar of belladonna as dandelion, whereby the plaintiff, as well as the druggists and all of the persons through whose hands it passed, were induced to believe, and did believe that it contained the extract of dandelion.

It was contended on the part of the

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defendants that the action could not be sustained, because there was no connection, transaction or privity between them and the plaintiff.

Mr. Hill, in his brief, laid down the proposition that affixing a false label to a poison and sending it into the market in that condition, so as to mislead others and endanger human life, was an unlawful act for which the defendant was responsible whether he did it willfully or negligently, and that to entitle the aggrieved party to sue in such case, no privity was necessary, except such as is created by the unlawful act and the consequential injury, privity of contract being out of the question; that the injury was not rendered too remote to sustain a recovery because separated from the unlawful act by intervening events, however numerous, provided they were the natural and probable consequences of the act; that is, such as would be likely to follow and might be easily foreseen; that where the unlawful act was in its nature likely to produce the very events which followed, the author of it may be treated as having caused each succeeding event, although they may consist of the acts of third persons; that the false label was not only likely to mislead druggists and others into the mistakes which followed in this instance, but such was its direct and almost inevitable tendency; these propositions were fortified by the citation of numerous authorities both English and American, and were sustained by the Court. The principle established by this case has been followed in subsequent decisions both in New York and elsewhere, and may now be considered as the settled law of the land. Mr. Hill's brief is remarkable for its clearness and conciseness, as well as the industry shown in the collation and citation of authorities.

The last case argued by Mr. Hill in the Court of Appeals was that of Olcott *v.* Tioga Railroad Company (20 N.Y. 210), which was not decided until after his death. The brief in this case was one of Mr. Hill's ablest. The point which was decided in favor of the plaintiff was that a foreign corporation was within the exception to the operation of the statute of limitations, by which the time of absence from the State was not to be taken as any part of the time limited for the commencement of an action against it. Mr. Hill took the ground in his brief that the statute of limitations was to be construed by looking at all its parts, and endeavoring to collect from the whole a uniform, consistent and rational line of policy; that the legislative intent or will is to control, irrespective of what was due to the mere proprieties of language or the strict grammatical import of isolated words or phrases; that an intent to do what was unjust, or to discriminate unjustly and without reason between different cases of a like kind, was not to be ascribed to the legislature, unless expressed with irresistible clearness, and that these doctrines were especially applicable to those clauses in the statute of limitations which purport to save demands, where there has been no opportunity of suing the defendant by reason of his non-residence, absence or otherwise. The Court in this case sustained Mr. Hill's position, reversed the judgment of the court below in favor of the defendant, and overruled the case of Faulkner *v.* Delaware & Raritan Canal Co., decided by the New York Supreme Court (1 Denio, 441).

In looking over the reports and the briefs of Mr. Hill, one is impressed with the great variety of the cases which he argued. He seemed equally at home in cases at common law and suits in equity, in actions of tort and actions upon contract. Some of his strongest and most successful arguments were in criminal cases.

Mr. Hill was not an orator in the ordinary sense of the word. His manner was cool and unimpassioned. His arguments were not an appeal to the sympathies or prejudices of the court, but were based upon reason

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and authority. His clearness and force of argument was so great as often to produce the effect of eloquence, although he did not seek a reputation for eloquence.

In the case of McMahon *v.* Harrison (6 N. Y. 443), Mr. Hill successfully contended that a professional gambler was "incompetent by reason of improvidence," and thus within a statute of the State of New York, which prohibited letters of administration to be granted to a person thus incompetent, although the evidence showed that, as a gambler, he had, up to the time that the testimony was given, been successful. It is said that one of the judges of the court remarked, at the adjournment, that Mr. Hill's argument was "the most eloquent and convincing that he had ever listened to."

He was not adapted to the conducting of jury trials, and very rarely in that portion of his life which succeeded his removal to Albany, participated in such trials, except as an adviser, and sometimes in the argument of important questions of evidence which arose during the progress of a trial. The writer has been told by those who knew him while a member of the firm of Hill, Cagger & Porter, that they never knew Mr. Hill to sum up a case before a jury. This was partly owing to the fact that the demands upon him in the appellate courts, and in important cases on the equity side in the United States Circuit Court, like the Hudson River Bridge cases, necessarily occupied most of his time. But it was doubtless still more owing to the fact that he much preferred the preparation of briefs and arguments, and the argument of causes on appeal, to the trial of cases at *nisi prius*.

Those who were associated with Mr. Hill, either as counsel, or as students or assistants in his office, all unite in bearing the highest testimony to the amiability and unselfishness of his private character. The writer has been favored with a letter from the Hon. William D. Veeder of Brooklyn, formerly Surrogate of King's County, from which he is permitted to make the following extract. Mr. Veeder says: —

"My first recollection of Mr. Nicholas Hill was early in 1857, when he was in the zenith of his fame as a lawyer, and when he was regarded as one of the leading lawyers of the country. I was then a student in the law office of Nicholas Hill, Peter Cagger and John K. Porter, who were associated together under the name of Hill, Cagger & Porter. Mr. Hill was at that time chiefly engaged in the argument of cases in our Court of Appeals and in the United States Supreme Court. I soon found him very pleasant and agreeable, and heard him utter many encouraging words to the students in the office, and to me personally he was most kind. I remember the beginning of his attention to me: being in the library, he asked me to hand him authorities or books from the racks, which soon developed into a field of learning for myself, which has been invaluable to me all my life. He would frequently state a proposition that he was considering, and ask me to see what I could find that I thought — using his language — 'would fit,' and it is a pleasure for me to say that however clumsily I may have discharged that duty, I was never discouraged by him, but on the contrary, in the most amiable way, he would devote himself to explaining to me wherein the case did or did not apply. He was an untiring worker, often working until the small hours in the morning in the library. At that time the firm's library was the most complete of any private law library in this State. The labor then of finding cases reported bearing upon a point was far greater than it is now, the digests or reports of the cases being then so much less complete. Mr. Hill was exclusively devoted, as I knew him, or saw him, to the consideration of legal questions. He seemed to give no attention to himself personally, and it was a matter of amusement in the office, the almost invariable habit he had of overlooking or forgetting his own matters.

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I remember occasions when he would order hats and gloves to be sent to the office, and they would remain there unused and evidently entirely forgotten by him, until some member of his family would come in, and then began a house-cleaning and gathering together of the many things which Mr. Hill had sent to the office and had never used. It was said that he would go to the tailor's and order a suit of clothes, and perhaps the very next day give the same order over again, and had to be reminded that such an order had been already given. I don't believe he knew anything about financial matters, for he seemed to depend entirely upon Mr. Cagger, and would approach Mr. Cagger and inquire if he could have some money, just as deferentially as any of us boys in the office, or in a manner that would indicate that it had just occurred to him that he needed some money. I thought then, and my experience since proves, that that office was one of the best equipped offices of general practice in the State. My last recollection of Mr. Hill in court was in the argument of the celebrated Albany Bridge case, which took place before the United States Circuit Court, in the City of New York, in which case my recollection is that Hon. Reverdy Johnson was the leading counsel on the other side. Mr. Hill was not a demonstrative man, nor was he at all repelling. There was that about him which almost immediately won your confidence and respect, without any demonstration on his part. A few simple, concise expressions would direct your mind and your friendship towards him. And while he was absorbed in his cases, he always had room in his great mind to be instructive and considerate. Somehow I cannot call back many incidents or characteristics of Mr. Hill. I am so occupied that I have been very tardy in sending you even this. Perhaps you will recall other anecdotes that I have before stated. One now comes up. On one occasion Mr. Dean Richmond was in the library, and while conversing with Mr. Hill, related his experience with a colporteur, or distributor of tracts, on the railway trains. Mr. Richmond had recently issued an order prohibiting such distribution. It will be remembered that at that time there were no sleeping-cars, and what little rest or sleep passengers might obtain was by sleeping in their seats, and these distributors would frequently wake up a passenger and endeavor to interest him in some religious matter. Mr. Richmond's story was that he had that morning come in from Buffalo, and while on the train he met one of these gentlemen, who vehemently berated him (Richmond), of course not knowing that he was addressing Mr. Richmond, the president of the road, for his action, characterizing it as sacrilegious to prohibit the distribution of religious information. In relating this conversation to Mr. Hill, Mr. Richmond elaborated the remarks of the religious gentleman with a great many profane or 'cuss' words, which was well known to be an unfortunate habit of Mr. Richmond's, although not at all malicious. Mr. Hill heard him patiently, asked him to repeat what the minister said carefully, and after he had repeated it, embellishing it still more, Mr. Hill quietly remarked, 'Why, Mr. Richmond, did the Dominie swear like that?'"

Mr. Hill left surviving him a widow and two children. Edward Bayard Hill, his only surviving son, was admitted to the Bar in Albany. Just as he was entering upon his professional career the war of the Rebellion broke out, and he immediately went to Washington through Baltimore, a journey which at that time was attended with some difficulty and danger, and carried important military intelligence to the government. He was appointed a lieutenant in the regular army, and commanded a battery in the first Bull Run battle. He obtained the credit of saving his battery and bringing it back to the Union lines uncaptured and unsurrendered. Early in the summer of 1862, at one

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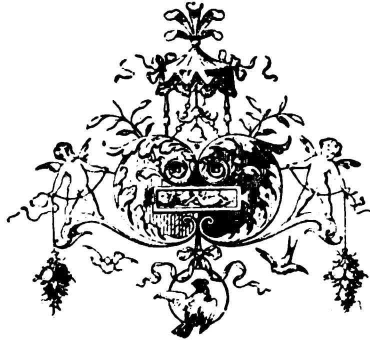
of the battles on the Chickahominy, he was wounded by a minie ball which entered his wrist and came out near the shoulder. The wound, although serious, was not deemed mortal, but he was brought to the Brevoort House in New York, where he died on the thirteenth day of June, 1862. Mr. Hill's only daughter is the wife of Samuel A. Noyes, Esq., a practicing lawyer in New York City.



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THE SURRATT CAUSE CÉLÈBRE.

By A. Oakey Hall.

THE case of the young Italian girl who was sentenced to execution for the murder of her traitorous lover in New York City has excited marked attention over the Union, and revived the always emotional question whether a woman should ever be put to capital punishment.

Thirty years ago last summer the attention of the whole country was aroused by the same question through a trial that in national interest has been equaled only by the prosecution of Aaron Burr.

The details of the prosecution, conviction, and hanging of Mrs. Mary E. Surratt at the national capital in July, 1865, are so indefinitely known to this generation that an article purporting to present the legal and historic features formed by those details may not prove uninteresting. These remain the more interesting when she became, after her death and burial, substantially declared illegally convicted, and in effect entitled to a new trial, through what is known in the legal profession as the Milligan decision in the Federal Supreme Court. Mrs. Surratt was tried and condemned by a military court-martial held outside of military lines, and was denied indictment and arraignment in a court of civil jurisdiction against her application therefor. Several months before the condemnation of Mrs. Surratt, one Lambdin P. Milligan of Indiana had been sentenced by a Military Commission, sitting at the capital of that State, to be executed after conviction by it for conspiracy against the United States Government, for affording aid and comfort to Confederates, for inciting insurrection, for divers disloyal practices, and although a civilian) for violation of the laws of war. His objections to the jurisdiction of the Military Commission and the propriety of his denial of civil trial came before the Federal Supreme Court six months subsequent to the execution of Mrs. Surratt; when all the judges decided that the Military Commission had no jurisdiction to try Milligan, that he should have been tried by a civil court, and that the findings and sentence were void, wherefore they discharged him. The only difference between jurisdiction in his case and that for Mrs. Surratt — and in her favor — was that the Milligan trial proceeded while the Civil War was raging, and that her trial began after it had ended. But this is somewhat, yet understandingly, anticipating the occurrences at the Surratt hearings.

Those began on May 10, 1865, twenty-six days after the assassination of President Lincoln and the contemporaneous murderous midnight attempt upon the lives of Secretary Seward and his son. The trial proceeded during a time when the body politic of the nation throbbed with such intense excitement as in the memory of this generation accompanied the Guiteau assassination of President Garfield. The entire North, while Mrs. Surratt was being tried, echoed a wild cry for legal vengeance that first came from Washington. Moreover on the day that the Surratt Commission met, public attention was additionally aroused by the arrest of the President of the Confederacy. Had Mrs. Surratt been then arraigned before a civil court — no matter to what even distant portion of the land its venue may have been charged — there can be no doubt that the empaneling of an unbiased challengeable jury would have been difficult, if not impossible. The Commission was duly constituted, without any voice of Mrs. Surratt in selection of its members, under the ordinary procedures applicable to courts-martial. Its designated members were nine in number. Their President was Major-General David Hunter, and its other members were

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Major-General Lew Wallace (best known to this generation as the author of "Ben Hur"), Brigadier-Generals Ekin, Foster, Harris and How, Major-General Kautz, and Colonels Tompkins and Clendenin. General Joseph Holt was Judge-Advocate — he held that post over the entire army — assisted by Congressman John A. Brigham and Colonel Henry L. Burnett as Assistant Special Judge-Advocates. They met in the upper story of the penitentiary building. Mrs. Surratt was charged jointly with seven male prisoners with having traitorously conspired with John H. Surratt (her son who had escaped to Europe), John Wilkes Booth (whose remains had then been freshly interred in the cellar of the building), Jefferson Davis, George N. Sanders, Beverley Tucker, Jacob Thompson (late of the Buchanan Cabinet), Congressman Clement C. Clay (and three others not notable), to kill and murder Abraham Lincoln, Andrew Johnson, William H. Seward and Ulysses S. Grant.

To this general charge was appended a specification that the design of the traitorous conspirators was to deprive the army and navy of their Commander-in-Chief, to prevent a lawful election of a President and Vice-President, and by such means to aid and comfort the Rebellion and overthrow the Constitution and laws. The specification alleged as an overt act the killing of President Lincoln by Booth and by the accessory act of each other accused. Another overt act was that of prisoner Spangler, an attaché of the theatre, and one Herold in aiding Booth to approach the box and in barring its door after his jump to the stage. Also that one Payne, in furtherance of the conspiracy, attacked Secretary Seward; that one Atzerodt laid in wait to slay Andrew Johnson, and one Michael O'Laughlin to kill General Grant. And that Mary E. Surratt received, entertained, harbored, concealed and assisted each one of the accused men, with knowledge of their murderous conspiracy. A similar specification was made against one Samuel A. Mudd. All the eight accused were arraigned to plead not guilty without counsel. The Commission adopted procedures in camera, with refusals of admissions unless under permit of President Hunter, who was also to designate reporters for the press. Each one admitted was to take an oath of secrecy until released in whole or part therefrom by Judge-Advocate Holt, and any counsel for defense appearing must either take the iron-clad oath of loyalty or furnish evidence that it had previously been taken. On the day following the plea, counsel to the number of six appeared — none of them of especial eminence except General Thomas Ewing, of the famous Ohio family of that name and a brother-in-law of General Sherman, and in a few days afterwards Senator Reverdy Johnson of the Maryland Bar, who had served as Attorney-General in the Cabinet of President Taylor, joined as special counsel for Mrs. Surratt and as a volunteer. Practically, however, the seven counsel came as a unit — the circumstances of defense applying equally to each conspirator. Upon the appearance of Reverdy Johnson objection was made by members of the Commission to his attendance, and on the ground that he did not recognize the moral obligation of the oath designed as a test of loyalty. Mr. Johnson met the objection with a most eloquent answer. Said he in the course of his address, "No member of this tribunal" — and he was particular ever to so designate the Commission —" recognize the obligation of the oath more than I do." Then flashing his lustrous eyes on each member, one by one, he added, "Nothing in my life would induce me to avoid a comparison in all moral respects between any member here and myself. I am glad that such an aspersion is made when I have arrived at that period of life when it would be unfit to notice it (pausing for a moment) — in any other way." Becoming bolder he added, "Who gives to you the jurisdiction to decide upon the moral character of any counsel who may

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choose to here appear? Moreover where is your authority to demand the oath? I have taken this same oath in many courts. It would be very singular if one who has a right" — repeating it — "a right to appear before the supreme judicial tribunal of the land, and a right to appear before one of the legislative departments of the Government whose laws create courts-martial, should not have a right — a right to appear here in any event."

To this manly and eloquent defiance the President (General Hunter) replied with some irritation of manner and rather unjudicially: "I had hoped the day had passed when freemen from the North were to be bullied by humbug chivalry, but for my own part I hold myself personally responsible for everything I do here." General Lew Wallace, with that kindness of tone that now appears on every page of his almost matchless romance, "Ben Hur," became peacemaker, and remarked that inasmuch as Mr. Johnson had already taken this oath as a senatorial move, its readministration be dispensed with. But Mr. Johnson never took an active part in the defense, having many previous engagements, but he was active in consultations. He however prepared an argument against the jurisdiction of the tribunal to arraign Mrs. Surratt, because she was a civilian and entitled to a hearing by grand and petit juries in a civil court. Great use was made of this consummate argument during the ensuing winter in briefs by Messrs. Garfield, Jeremiah S. Black, and Dudley Field, in the Milligan case. Mr. Johnson, however, drew a plea to the jurisdiction for Mrs. Surratt, and demanded a separate trial. To which the Judge-Advocate took the usual objection that such separate trial was not a right in a conspiracy case, and there was no differentiation of her from her associates — under the charges or evidence — the act of any one conspirator, when the conspiracy is established, being the act of all.

An unprecedented incident on a criminal trial was noticeable throughout it in the shackling of the accused while seated with counsel. Many years afterwards, when the incident came into a Congressional discussion, General Holt denied that Mrs. Surratt was shackled. The legal profession may recall that the custom for a prisoner or accused to hold up his right hand on his arraignment for plea, was originally instituted in England to show the court that he was no longer handcuffed, as was once a practice in the days when accused were not allowed counsel. But many witnesses claimed that Mrs. Surratt, although freed from handcuffs, had steel anklets on. It is certain that during the hearings all the others were both handcuffed and fettered at the legs so as to hamper walking. Two, Payne and Atzerodt, had attached to their leg-chains iron balls which the guards who escorted them were compelled to lift up when entrance and exit was made to and from the trial room. But it must be remembered that at this time Washington, and indeed much of the North, was in tremors of excitement; and allowance in 1895 must be made for 1865.

No lawyer of experience in criminal jurisprudence can now read the testimony for the prosecution taken before the Commission without arriving at the conclusion that, if it had been offered in calm times before a learned court, the great bulk of it would have been excluded either on the ground of incompetency or irrelevance — and mainly on the latter ground. The Military Commission seemed to be not only ascertaining guilt for purposes of public example, but also educating public sentiment of the North as to alleged complicity of Confederate officials with the assassination. Of the unarraigned conspirators named in the charges, only Jefferson Davis and Clement C. Clay were within Federal jurisdiction, and they could have been brought before the Commission for trial had the Judge-Advocate so desired.

One hundred and forty-seven witnesses were presented by the prosecution, and about sixty of these directed testimony toward the

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character of the Rebellion — that being the word always used during the Judge-Advocate's conduct of the case — and toward the probable complicity of its leaders in the plot of assassination. Very much of the testimony was hearsay. Only nine witnesses seem to have given evidence incriminating Mrs. Surratt, who was a boarding-house keeper, and of whose house many of the arrested conspirators had been inmates or visitors. Two years later, in the summer of 1867, many of these witnesses testified at the trial of Mrs. Surratt's son, which came on before the Criminal Court for the District of Columbia, Judge Fisher presiding, Attorney-General Edwards Pierrepont prosecuting, and Messrs. Bradley and Merrick, leaders of the Washington Bar, being counsel. That trial resulted in an equal division of the jury and in its discharge with the accused never again arraigned. In effect six of the jury acquitted the mother, by to that numerical extent acquitting the son.

The defense of Mrs. Surratt and her alleged co-conspirators substantially proceeded on the ground that Booth's original idea and down to the day of the assassination was only to capture and hold in hostage the government officers; and that this at the most constituted any conspiracy — if the various meetings of the accused were to be regarded as acts of conspiracy; but that the assassination came through a sudden impulse of Booth of which the others were ignorant. An entry to that effect was in the diary taken from Booth on the capture of his body, and was produced on the court trial of young Surratt; but for some reason it was withheld by the Judge-Advocate on the mother's trial. And, of course, before court-martial the counsel of Mrs. Surratt had no such means of forcing its production as had the counsel of the son before a civil tribunal.

All the various counsel for the accused addressed the Commission at the conclusion of testimony, but probably the speech of General Ewing may be regarded as the most important. They were answered by Assistant-Advocate General Bingham, a very grand orator of the period; but his address, as read now, savors more of the old Sir Edward Coke style of prosecution than of an impartial Judge-Advocate.

During his address General Ewing several times digressed to ask questions of Mr. Bingham, and some of them were very searching; for instance, "How many crimes have my clients been tried for?" to which the answer came, "It is all one continuing transaction." Again, "Under what code or statute comes our alleged crime?" To which it was answered, "The common law of war." Mr. Clampitt, of the local Bar, who was especially attorney for Mrs. Surratt, interposed with, "So this lady, a non-combatant by the laws of war, is being tried on a nine-fold omnibus charge jointly with seven men entirely under the common law of war; and for the first time we lawyers hear of such a branch of common law."

Ten days were consumed in addresses for the accused, and then two days were employed by Special Judge-Advocate Bingham in a speech that was both an argument for the prosecution and in the nature of a judge's charge to his associates on the Commission. Read to-day the effort seems to have been in one aspect an appeal to the excited galleries of the American people provided by stenographers and newspapers. It generalized, and shrewdly avoided any dwelling upon details of evidence. It termed the aggregate of evidence "a combination of atrocities"; and proceeded from prologue to epilogue on the assumption that the chief traitors against the government (meaning Davis and political associates) "secretly conspired with these hired confederates to achieve by assassination what they vainly attempted by wager of battle. Whatever may be the conviction of others, my own conviction is that Jefferson Davis is as clearly proven guilty of this conspiracy as

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is Booth, by whose hand Jefferson Davis inflicted the mortal wound upon Abraham Lincoln!"

In this connection it may seem appropriate to say that it is doubtful whether there lives, or has lived, an impartial lawyer who, reading the evidence as matter of history, would agree with that statement. Horace Greeley, a very St. Paul in patriotic opposition to the warlike attempt upon the Union, did not think so when he braved the scorn of associates by signing a bail bond for the release of him "who through Booth's hand assassinated." And certainly not any one connected with the government of the restored Union thought so, because it allowed Jefferson Davis to live for years unarraigned and to die unmolested. This historical solecism exists for some future Bancroft, Hilliard, or Macaulay to dissect, that the government which found the alleged sub-conspirators guilty gave immunity to the principal alleged conspirator. In the official record not even a suggestion of evidence is apparent that Jefferson Davis directly or indirectly had personal or hearsay knowledge of any of the sub-conspirators, or of a conspiracy to capture as a hostage, and much less to murder, President Lincoln.

Special Advocate Bingham, referring to the case of Mrs. Surratt, said, "Nothing but the conscious coward guilt of the son could possibly induce him to absent himself from his mother as he does upon her trial." This ebullition of rhetoric now certainly sounds odd when contrasted with the subsequent history of his case herein before referred to.

When the addresses ended the courtroom was cleared, and the military members, permitting the lawyers for the prosecution to remain and assist the deliberations, went into executive session. This continued during two days, and the official record of what then and there occurred is substantially barren. But it shows a general verdict of guilty upon all.

Then came up the problem of punishment. A majority could impose imprisonment, but death could be pronounced only by the vote of two-thirds. Spangler received the lowest imprisonment. Four were sentenced to life imprisonment; and Mrs. Surratt, Payne, Herold and Atzerodt to be hanged — General Lew Wallace not consenting to the death penalty upon the woman, nor upon Payne because his attempt to kill Secretary Seward had failed, and the law therefore did not exact the "eye for an eye, and a tooth for a tooth." It was generally understood that some members of the Court thought that the execution of Mrs. Surratt would exercise a wholesome influence upon Southern women, who, during the speech of Mr. Bingham, had been associated in illustration with Lady Macbeth and her exclamation to the powers of evil to unsex her. And there is evidence that the two-thirds vote of death for Mrs. Surratt was only brought about by one of those compromises that often invade the consciences of petit jurors. The compromise, in the handwriting of Mr. Bingham, was as follows: "The undersigned (reciting official status) respectfully pray the President, in consideration of the sex and age of Mary E. Surratt, if he can upon all the facts of her case find it consistent with his sense of duty to the country, to commute the sentence of death to imprisonment for life." A most remarkable document for shifting responsibility, when it is recalled that the Court possessed precisely the power so asked when it came to sentence, and had exercised commutation upon several of the convicts.

Then the question was whispered over the telegraphic wires, and in every newspaper, and in ten thousand homes, "Will President Andrew Johnson sign Mrs. Surratt's death warrant?" He answered in a few days by signing it, and designating the second ensuing day as one for her execution, and directed to Major-General Hancock. Here it may be remarked came in ill luck

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for that officer, for when, thirteen years later, he was a candidate for President, the much-repeated charge, "he hanged Mrs. Surratt," circulated among the religious body of which she was a member, lost him undoubtedly hundreds of thousands of votes; and yet his duty in the matter was perfunctory and discretionless.

During the brief interval telegrams and letters came to the White House invoking mercy. Numbers of callers on the same errand invaded its doors. At that time ex-Senator Preston King of New York, and collector of its port, was a White House guest, and had long been the President's intimate friend. Also in the city was another close friend, General James Lane of Oregon. It was claimed at the time and since that these two, in constant attendance upon President Johnson, persuaded him against mercy, and indeed, did much to keep him in seclusion, even against the appeal of Mrs. Surratt's daughter. Superstitious sympathizers with Mrs. Surratt have invited attention to the fact that both those gentlemen some time afterward committed suicide at different times and different places, and that the President had to endure a trial of impeachment.

Now comes consideration of the most remarkable incident connected with the whole matter. As yet the public were uninformed of the existence of any official request for commutation and recommendation of Mrs. Surratt for mercy.

And some years afterward President Johnson made the astounding declaration that he had never been shown the request for Mrs. Surratt's commutation, and only learned for the first time of its existence when Attorney-General Edwards Pierrepont, opening the case against John H. Surratt, produced the original and declared that it had been laid before the Cabinet by the President, and that every member voted against the commutation. The Attorney-General had been erroneously instructed, for the Cabinet members denied that they had ever seen the paper. But under date of 1873, in replying to Judge-Advocate Holt, who had declared that he duly laid the request before the President at the time of applying for the death-warrant, and thus raised an issue of veracity, that President, then out of office, and who had again become a Federal Senator, wrote thus: "Having heard that the petition had been attached to the record, I sent for the papers on August 5, 1867 (this was soon after the Pierrepont announcement), with a view of examining, for the first time (those words being underscored), the recommendation in the case of Mrs. Surratt, a careful scrutiny convinced me that it was not with the record when submitted for my approval, and that I had neither before seen or read it." On this issue of veracity history must leave the mystery.

The issue of veracity derives support for the President's side from the omission to give a copy of the document to the newspapers eager for any information about the fate of Mrs. Surratt; from its non-appearance in the published official record of the Military Commission, or in the reports thereof of the Judge-Advocate to the President or to Congress; and from its omission from a book compiled by Stenographer Pitman for popular use, professing to give a history of the trial and its results.

When the death-warrant was read to Mrs. Surratt, at noon on the day before the date of death, she protested that she had no hand in the President's death, and was entirely innocent of any criminal complicity. Thereafter she remained in a state of collapse under medical treatment — even denied the presence of her daughter, who was at the prison under escort of the priest. On the next morning her counsel obtained from Judge Wylie a writ of habeas corpus for her production. This was met by a return from General Hancock, to whom it was addressed, to the effect that the President, un-

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der the special statute, had suspended the operations of the writ; and of course the procedure fell. It was asked in the legal profession at the time why counsel did not follow procedures that in the Milligan case were formulated; but the answer came that those went through Federal District Courts in a State, and that no such procedure could emanate in the District of Columbia.

Taken to the scaffold, supported by guards, and cheered by her confessor, she, in company with three others of her "co-conspirators," was placed to her degradation on the drop beside Payne, the would-be and self-confessed assassin of Secretary Seward; while Herold and Atzerodt were placed together upon an adjoining drop.

Almost with her last breath, moaning even under the death-cap, she protested her innocence.

So the end came, with a prison burial; for even her corpse was denied to her daughter.

The Surratt *cause célèbre* is throughout a curiosity in legal history. Lawyers will have to go back centuries into State trials to find such breaches of the rules of evidence as mark it. Soldiers who had been prisoners at Libby and Andersonville were allowed to testify to Confederate cruelties; hearsay testimony established a burying by the Confederate government of torpedoes at Richmond for use if the Union troops entered it; one witness was allowed to testify that an alleged Confederate agent paid him to try and introduce fever-affected garments into Northern cities; a confession of a Confederate spy (already hanged) that he was hired by the Richmond government to burn New York City; a clipping from an Alabama newspaper that showed a private offer to kill President Lincoln and Vice-President Johnson if a certain sum was raised; a cipher letter found floating in North Carolina waters; letters found in the archives of the Davis government when Richmond was captured suggesting plots for retribution upon the North; were all allowed as evidence. And when are considered the ironing of the prisoners in an American court-room; the too late decision that Mrs. Surratt's court never had acquired jurisdiction over her; the substantial acquittal of her son on the same old evidence; and the mystery of the commutation certificate; may it not be well observed that the Surratt *cause célèbre* takes as interesting a position in court annals and among state trials a sany other known criminal investigation; and markedly so to lawyers who care to trace the pitfalls that commonly surround court-martial or civil trials during scenes of popular excitement.

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TO AN OLD LAW-BOOK.

'TIS only three years since you entered the world,
Since you came from the publisher's hand.
Then your fame with the speed of an arrow was hurled
Through the length and the breadth of the land.
Amongst all the lawyers your name was well known,
You were praised by the Bench and the Bar;
In favor with students you quickly had grown,
You were voted best law-book by far.

At the height of your fame, though, a statute was passed
Which rendered you useless and old;
For new books were published, and then you were cast
Most unfeelingly out in the cold.
'Though once so well known, now unheard is your name,
Stowed away on the shelf there you lie;
Oh, is it not foolish to run after fame,
When all fame can so easily die?

Poor volume, 'tis useless to pine or to fret
At the way you've been treated, for when
You think, you must own, that the treatment you've met,
Is the fate of the greatest of men.
The mightiest heroes who ever were born,
They have only been famous a day,
They are honored, they're praised, they are famous at morn,
And by ev'ning their fame's passed away.

Oh, volume, consider, great men, like yourself,
When they die on one side are then thrust,—
They are laid in the grave, and that grave is the shelf,
Where forgotten they crumble to dust.

—*Lays of a Lazy Lawyer.*

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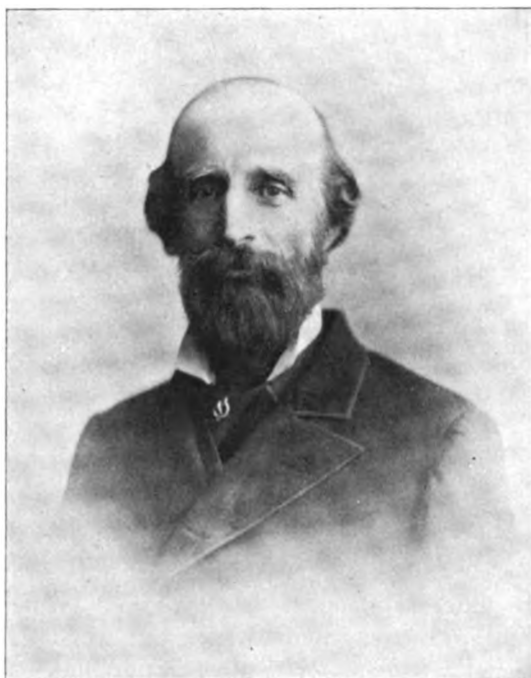
THE SUPREME COURT OF MEXICO, AND THE JUDICIAL SYSTEM OF THAT COUNTRY.

By Hon. Walter Clark.

NOTWITHSTANDING Mexico is our next-door neighbor, probably there is no country in regard to whose judicial system the members of the legal profession in this country have less information. Mexico has somewhat over twelve millions of people. Its political institutions are largely patterned upon ours. There are twenty-seven States, two Territories, and a Federal District. For each State two senators are chosen by popular election for the term of four years, one half going out every two years. The members of the lower house of Congress are chosen every two years upon the basis of population, as with us. The President is chosen every four years by electors chosen by the people.



MANUEL DE ZAMACONA.

The Federal judiciary consists of one Supreme Court, circuit courts, and district courts. The States have, as with us, each its Supreme Court, superior courts and justices of the peace. Also each State has its governor and legislature. Thus it will be seen how closely the organization of their judiciary, legislative and executive departments resembles that in this country. There is a vast difference, however, in the administration of the courts.

As to the organization of the courts: The Federal Supreme Court of Justice is composed of eleven justices and four substitutes, a Government Attorney and an Attorney-General. They hold office for six years and are elected by popular vote. The Government Attorney and Attorney-General sit as integral parts of the Court. So, also, in practice do the four substitutes (so-called), who are in effect simply additional justices. The eleven justices are divided into three Departments or Salas, the first Sala being composed of five justices, and the second and third are each composed of three. The four additional justices, the Government Attorney (fiscal) and the Attorney-General, are likewise apportioned between the three Salas, or Court Divisions. On questions of constitutional law the whole seventeen sit as one body. The Chief-Justice is elected yearly by the members of the Court.

The jurisdiction of the Federal Supreme Court, of the Federal Circuit and District courts and of the State courts is very nearly the same as in the United States.

The Circuit Courts have about the same duties as the Circuit Court of Appeals in

the United States, and the Circuit Court judges do not go on a circuit. The Federal circuit and district judges are appointed by the President, on the recommendation of the Supreme Court, for six years.

There are also Federal district courts which have about the same jurisdiction that similar tribunals have in our country. This court has original jurisdiction in the matter of *Amparo*. This writ is invoked when any right conferred by the Constitution is violated. In some features it resembles our writ of habeas corpus. But it is more comprehensive. For instance, if a man finds that his property, or any other constitutional rights, are interfered with by either civil or military authority, or even by a judicial sentence of a Federal or State court, he applies to the proper district court, which has the authority to suspend at once the act complained of, and decide the case; the decision in such case must go for revision to the Federal Supreme Court.

The State courts are: justices and correctional courts, civil courts of first instance and superior and supreme courts. Although the procedure is entirely different from that of our country, the jurisdiction of the above courts is similar to that of the justices of the peace, superior and Supreme or appellate Courts of our different States.

The superior tribunals are composed usually of four departments, which apportion cases according to their nature as provided by case of civil procedure.

Most of the States of Mexico have adopted codes of civil procedure, penal code and commercial code. There is no jury in civil cases.

Criminal practice is entirely different from that of the United States. It differs from the very first step. A person is arrested and placed in close confinement without being able to communicate with any one, not even counsel. The judge investigates ex parte the case for a preliminary trial, and within seventy-two hours, if he finds no reasonable ground to hold the accused, he discharges him. However if the magistrate is of the opinion that there is cause to investigate the case, he holds the defendant for further examination. All the evidence in the preliminary examination is taken down in writing. There has been severe criticism from those accustomed to our system of judicial procedure that this preliminary examination is in secret and that the defendant is neither confronted with his accusers nor has the benefit of counsel. In fact, however, having no grand jury, this is simply in analogy to our grand jury, whose proceedings are conducted in the same manner. The trial jury is composed of nine. A verdict rendered by five acquits or convicts, with a right in the Court to order a new trial. A verdict by eight acquits or convicts absolutely and the Court has no power to order a new trial. Six peremptory challenges are allowed the defendant. Two additional jurors are sworn, sit with the jury and hear the evidence, but have no vote unless one of the nine is taken sick or is excused, when one of these takes his place. This is to prevent mistrials.

No bail is allowed until the judge examines the case, and if the crime is punishable by five years' imprisonment, generally bail is not allowed. Their prisons might be better, but usually are as good as those in most of our States.

The Mexican penal legislation is far more effective than the American, in the ascertainment of the guilty one, and the punishment of the crime. It has many features of the French and Spanish system of criminal jurisprudence. It is certainly more speedy. Lynch law is unknown, because it is unnecessary to resort to it, as in the United States, to protect society from murderers. On this point the costly and expensive court system of this country breaks down. The numerous peremptory challenges and the numerous other technical advantages given a prisoner on trial for his life in the

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United States, to say nothing of the unanimity of a verdict of guilty in such cases, which is still required in most of our States, and the proneness of appellate courts to show their superior astuteness by picking some minute flaw in every appeal in a capital case coming up for review, has satisfied the public in this country that there is very little protection from murderers to be found in our courts. Consequently, in the United States the number of murders last year was ten thousand five hundred, being seven times as many as in 1885, an abnormal growth for eleven years. And of this ten thousand five hundred, only one hundred and two were executed by law, less than one in one hundred, while double that number were hung by Judge Lynch. In Mexico, with its twelve millions of people, less than five hundred murders were committed last year.

PRUDENCIANO DORANTES.

The civil law is substantially the same that prevails over a large part of Europe — the Code Napoleon. All evidence is taken down in writing, and there being no jury, the cause is argued before a bench usually of three judges, who find the facts and the law, and from whom an appeal lies to another bench in the appellate court, who review the findings on both the facts and the law.

Argument (except in criminal cases, before a jury, which is of course oral) may be oral or in writing, but most usually the argument in civil cases, and in criminal cases on appeal, are submitted in writing or by printed argument.

In the courts of last resort an oral argument is an exception, and is only allowed upon motion to that effect granted. This, I believe, is true of the Supreme Court of Ohio and a few others in this country.

As in all countries where the civil law prevails, the courts decide cases by finding the facts and stating the legal result arising therefrom without giving reasons. In short, no opinions, in our sense of the word, are filed, and there are no precedents. Whatever may be said in favor of our system, the civil law system has three distinctive advantages, and there may be others. 1. If an error is made in a case, it cannot be quoted as an authority for the repetition and reproduction of the same error by that Court or any other. 2. There are no groaning shelves filled with lengthening lines of reports, wasting alike the time and the pocketbooks of the legal profession. 3. Instead of wasting researches to ascertain the number oftimes judges (whose capacity, impartiality and training are usually unknown and necessarily incapable of being weighed) have expressed views on one side or the other, the legal mind is permitted to expand by arguing each case as it arises, upon the merits and "the reason of the thing"— not upon its fancied resemblance, more or less accurate, to other cases which may have been rightly

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or wrongly decided. This exacts a greater exercise of the reasoning faculties, but saves the time and expense of our system, which requires an exhaustive search for "precedents," to ascertain what other men, under circumstances more or less similar, have *said* was the law. The body of the law being codified, its provisions are to be found in the Code, in analytical arrangement, and not scattered at random through unending volumes of reports. There are leading text-books on divers branches of the law, containing the elementary principles reasoned out to logical conclusions, as with our older text writers. Our more recent text-books, both in England and this country, contain very little original thought or reason, but practically and necessarily are rather sheafs of headnotes gathered from the National Digest upon some particular head of the law.

Both the civil law and the common law have their weak points and their strong ones. It will be wisdom to compare them and eventually select what is best from each.

The Mexican Federal Constitution guarantees freedom from slavery, which has been prohibited since 1824 (a period prior to emancipation in the British West Indies), freedom of the press, of speech, and the abolition of convents and monasteries. By it, marriage is made a civil contract and Congress is forbidden to pass laws "establishing or prohibiting any religion." In fact, as well as in theory, there is absolute and entire religious liberty all over Mexico. During the three centuries of Spanish rule, 1521 to 1821, no country was more absolutely under the control of the Catholic Church than Mexico. As late as 1816, patriots taken in arms were burned as heretics by the Inquisition, because opposing Church rule, at the stake in the public square in the City of Mexico, now known as the Alameda. During the struggle for independence, the Church was on the side of Spain till the mother country adopted in 1820 a more liberal constitution, whereupon the Church in Mexico thought it no longer worth the while to oppose Mexican independence; but with independence the struggle between the Church and those opposed to its political power began anew and lasted with varying fortunes till 1857, when the present liberal constitution was adopted, divorcing Church and State. In the war which sprang up at once the reform party were forced in 1859 to confiscate all the property of the Church (which then embraced nearly half of all the property in the Republic), including the very Church buildings themselves, which have ever since remained national property, services in them being only conducted by governmental permission. The Church replied to this by fiercer war and calling in the foreigner. Foreign invasion ended in 1867, when Maximilian and the last Church-party President, Miramon, were shot at Queretaro. Since then, freedom of religion, as well of speech and of thought, have been fully established. The Constitution guarantees, besides freedom of speech and of the press, the right of petition and of public agitation and organization, also the right to carry arms, and to travel without permit or passport.

In Mexico, as in this country, a man's house is his castle. There can be no imprisonment except for crime. In all criminal trials the prisoner must be confronted with his accusers and witnesses, and furnished with the grounds of the charge against him. He is entitled to counsel, and if unable to pay for one he has the right to select his counsel, who must serve him without compensation, instead of, as with us, being experimented on by the younger members of the Bar assigned him by the Court. Extraordinary punishments are prohibited. The post-office is inviolable. Private property cannot be appropriated except for public use, and then must be paid for *before* being taken. Monopolies are prohibited and

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Churches are forbidden to own any real estate except what is used for their immediate and direct service. The veto of the President is suspensory only, and is overcome by a second majority vote of each house of Congress. In short, the Constitution of the United States of Mexico, while patterned after ours, being adopted in 1857 instead of 1787, has profited by the advance in thought and has also corrected some of the errors demonstrated by experience to exist in ours. The modification of the veto power and the election of senators and the judges of the Federal Supreme Court by the people, now proposed to be submitted as a constitutional amendment in the United States, have long since been adopted in Mexico.

Returning to the practice in civil cases, formerly it was the law, brought from Spain, that before bringing an action the plaintiff summoned the defendant before a Court of conciliation, presided over by a judge who was forbidden to be a lawyer, and whose duty it was, without hearing any evidence or making any decision, to endeavor to settle the controversy without litigation; and only when he gave a certificate that the matter in dispute could not be compromised could the plaintiff begin his action. This provision was in the Constitution of 1824, but was stricken out of the present constitution and the resort to the Courts of Conciliation is far from universal now. This practice was a feature in the Roman civil law, and still obtains among many European nations.

FELIX ROMERO.

With us, the trial being usually oral, and our trial of cases, civil or criminal, being at term time, only one civil case goes on at a time. Under the civil law only criminal cases before a jury are tried at term. All civil cases, and the criminal cases on appeal, are tried without the intervention of a jury, and the courts are open all the year round; consequently three or four or more cases can be in the hands of the court at the same time, for consideration or determination.

The causes which brought about the civil wars in Mexico have long since ceased to exist, and the country is now peaceful and prosperous, and developing with a rapidity only paralleled by Japan. Nowhere is life and property more safe or violation of the criminal law repressed with greater promptness and certainty than in Mexico.

The Supreme Court of Mexico, as now constituted, dates from the Constitution of 1857. By its terms, in event of the death or resignation of the President, the Chief-Justice becomes President. It was in this way that Juarez began his presidency in 1857, and Lerdo de Tejada, on Juarez' death in 1872. By a constitutional amendment in 1879 this was changed, and recently another amendment has been adopted, by which henceforth the members of the Cabinet, in an order named, will succeed

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ad interim upon any vacancy in the presidential office until a special election may be had to fill the office.

The present members of the Supreme Court of the United States of Mexico are:

MAGISTRADOS PROPIETARIOS: —

1 Francisco Martinez de Arredondo.
2 Justo Sierra.
3 Ignacio Mariscal (con licencia).
4 Manuel M. de Zamacona.
5 Prudenciano Dorantes.
6 Alberto Garcia.
7 Felix Romero.
8 Francisco Vaca.
9 José Mª Aguirre de la Barrera.
10 Eustaquio Buelna.
11 Manuel Castilla Portugal.

SUPERNUMERARIOS: —

1 José Mª Vega Limon.
2 Modesto L. Herrera.
3 (difunto) José Mª Canatigo.
4 Eduardo Novoa.

FISCAL: — Macedonio Gómez.
PROCURADOR GENERAL: — Eduardo Ruiz.

Judge Zamacona, above named, is a most courteous gentleman, and was formerly minister to this country. From him in a personal interview I obtained much of the above information, and the article has also had the benefit of corrections from Señor M. Romero, the present able representative of Mexico at Washington, and from Judge Sepúlveda, formerly of California, now U. S. Secretary of Legation in the City of Mexico.

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LEGAL ETHICS.

By W. E. Glanville, Ph.D., LL.B.

FROM a time to which the memory of man runneth not to the contrary, it has been popular to regard the members of the legal profession as a set of gentlemen who prostitute the business of their calling to the enrichment of unscrupulous greed, oppression and robbery. The litigants in a case have been likened to the two dogs who fought over a bone, while the attorney in the case has been likened to the sleek, sharp dog who ran away with the bone and retained it for his private use. It is reported that there is a club or confraternity of lawyers in connection with one of the Inns of Court, London, which has been named by its members "The Devil's Own." This sententious appellation probably expresses the popular idea concerning the legal profession. How this idea originated and why it is so prevalent is perhaps not difficult to determine. The usual explanation is that the personnel of the profession is of generally dubious character; that the Bar is the resort or rendezvous of persons of lawless propensities who believe that in the practice of this profession there are unusual facilities for ministering to their rascality.

It is not denied that the legal profession affords many inducements to rapacity; but it is denied that it affords greater inducements than many other vocations. In the matter of fees the charges of attorneys in this country compare most favorably with those of counsel in other countries, and in some cases the fee is fixed by statute. In fiduciary relationships, as trusteeships, guardianships, and receiverships, where temptation to extortion is strong, the greatest protection is afforded by courts to the beneficiaries, wards and creditors, and a strict accounting is required at regular intervals. Of course, if a person is destitute of principle and is conscienceless, he can make the profession of the law serve his ends to some extent. But the "*tu quoque*" argument applies here, and it would not be difficult to cite similar cases in political life, in almost every walk in commercial life, and in the professions of medicine and the ministry also, in which persons have a supreme regard for the shekels and a supreme disregard for any question of principle or conscience that would condemn their unlawful propensities. There are black sheep in every calling, and I am not aware that there are more in the legal profession, in proportion, than there are in other walks in life. To judge all by one argues a lack of ordinary intelligence and discrimination. Still it must be admitted that the popular impression credits the legal profession with an unenviable notoriety in this respect. To assert that the legal profession is lucrative is neither here nor there. There are prizes in the legal profession as in others. In the front rank of the medical and political professions there are men who realize as much "per annum" from their respective professions as men in the front rank of the legal profession do. A little reflection has led me to the conclusion that the explanation of this popular idea of the avariciousness and lack of principle in the profession of the law arises from the very nature of the profession itself. To a great degree it is necessarily concerned in disputes, animosities and rivalries that arise from the litigating spirit which is characteristic of human nature in its earthly mould. Sir Walter Scott, himself a lawyer of no mean parts, puts into the mouth of one of his legal characters in "Guy Mannering," the following wise and sensible language: "It is the pest of our profession that we seldom see the best side of human nature; people come

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to us with every selfish feeling sharply and newly pointed. Many a man has come to my office whom I have at first longed to pitch out of the window, and, yet, at length I have discovered that he was only doing as I might have done in his case, being very angry and of course very unreasonable. I have satisfied myself that, if our profession sees more of human roguery than others, it is because we see it acting in that channel in which it can most freely vent itself. In civilized society, law is the chimney through which all the smoke discharges itself, that used to circulate through the whole house and put every one's eyes out. No wonder therefore that the chimney itself should sometimes get a little sooty."

It is not in the nature of things for both parties to a suit to win. One fails. He has costs to pay and perhaps damages or a fine besides. He is chagrined. He is considerably out of pocket. Because he has failed, he is disposed to think that his attorney should not expect a fee. The attorney thinks differently. Hence arises a dislike for the profession which is considerably fomented by the explosive state of his feelings. Or perhaps he considers that he has not received justice; that he has been denied some of his rights. Hence he proclaims that the law is a travesty and justice a farce. Whereas, had he won the suit, his opponent would have failed and might probably have been equally eloquent in *his* denunciations of lawyers and of the profession generally. Now when you consider that there are of necessity hundreds of such instances as these every day, is it to be marveled at that this popular impression should exist? It is indeed to be regretted that more cases which simply arise from two persons getting at loggerheads with one another are not settled out of court. It does not add to the dignity of a court or of a community for persons who fail to keep the peace to be so anxious to air their grievances and wash their dirty linen in public. No decent housewife thinks of going through with a family washing out in the front yard. No lawyer of standing, who is proud of his profession, is fond of this kind of work. But if persons of quarrelsome disposition and litigious spirit are determined to thrust themselves into court in order to enjoy the sweets of revenge, and seek to comfort themselves with a money solatium, there is no help for it, and they must be prepared for the outcome of the trial if it prove a failure. I would therefore state that it is the misfortune rather than the fault of the profession which has led to this stigma being fastened upon it. It is further probable that an additional reason why this stigma has been attached to the legal profession is to be found in the alarming and singular pronouncements which are sometimes made in the administration of the law. It is true that in some of these cases the lay mind is not sufficiently instructed to recognize the principles which underlie apparently unjust decisions and dicta. But, account for it as you may, there is a growing spirit of uneasiness with respect to the absolute integrity of the duly authorized exponents of the law in the discharge of their high and responsible duties.

It is impossible to find language sufficiently plain to condemn conscious tampering and tinkering with the well settled principles of law for the purpose of shielding wrong, authorizing injustice or pandering to political expediency. Such conduct, whether it emanate from the bench or from the bar, is inexcusable and indefensible. It is a disgrace to the State and a shame to the persons who are so far forgetful of their oath of office (not to mention the sentiments of manhood), as to lend their countenance to it. It strikes at the foundation of peaceable society and imperils not simply the "*bene esse*" but the very "*esse*" of civilization. It should be visited with impeachment or disbarment. A justice of the peace or an attorney who will take advantage of a defenseless woman, say a widow in straitened

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circumstances, or oppress the fatherless, or "grind the faces of the poor," for the sake of lining his own purse, has no pretense for his practices either at law or in equity. Such conduct is iniquitous and disreputable. The law is dishonored by such officers.

Passing from the popular conception of legal ethics to the subject as it finds an exposition in the several titles of the law, I think it may be safely affirmed, in the language of Lord Erskine, that the principles of law are founded "in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life." This vast fabric having its foundation in the common law of England, with a growth of a thousand years, introduced to this country in colonial times, adapted to the new circumstances of a new nation, revised and improved in many particulars by the advancement of civilization, is calculated to dispense justice in the land and to be a refuge and shelter for the oppressed. There is no title of the law which is not based upon principles of abstract justice which will disclose themselves to you if your examination be conducted in a fair and dispassionate spirit. Take the law of contracts. A contract is an agreement, enforceable at law, by which two or more persons agree to do or not to do a particular thing. To a valid contract there must be competent parties and a reasonable consideration. For the sake of certainty, contracts involving money above a certain amount are required to be in writing, and for the sake of preventing fraud certain special classes of contracts are required to be in writing. Again, contracts which are against public policy or good morals, or which are in restraint of trade, or in direct opposition to some statute law, or which are usurious, are invalid and non-enforceable. Now these simple doctrines which constitute the foundation and framework of the law of contracts commend themselves to us as eminently just and fair. They create mutual or reciprocal rights and obligations between the two parties to the agreement, rights or obligations which cannot be declined without working injury to the other party, who can then invoke the aid of the court to redress his grievance. No one except a person who did not want to act justly himself could complain of the standard of ethics illustrated in the law of contracts. It is a fundamental maxim in ethics as it is in law that "a man should so enjoy his own as not to injure others." The man who does so is protected by law; but the man who so enjoys his own as to make a nuisance of himself, or to trespass upon his neighbor's rights and property, is justly and properly held answerable for his conduct. In the domestic relations, in the acquisition and transfer of real property, in the descent and distribution of property, the rules of law are all designed to uphold and preserve the rights of all the parties concerned. Then when you consider the manifold applications of equity jurisprudence supplementing the operations of the law and removing all manner of possible hardships and seeking to maintain the high standard set forth in that maxim, "wherever there is a right, there ought to be a remedy," it would seem impossible to disparage the strict justice of legal ethics. But it is in the application of these principles of law to any particular controversy that the door is open to abuse. It is appalling to harbor the thought that the men who occupy the highest positions in the legal profession should be susceptible to bribes and to the perversion of law and justice at the instigation of an influential suitor or a powerful corporation. As things are, however, it is in the power of the people to unseat judges who are guilty of such practices and to prevent them from holding office ever afterward. It is a very open question whether judgeships should be in the gift of political parties and should be manipulated by political machines. Judges in all cases should be men of tried and proved ability at the bar, who, by reason of service and em-

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inence in the profession, merit the promotion to which their brethren elect them. It is not to be disputed that if legal ethics are to be maintained the judges must be clear-headed, upright men and accomplished jurists. Equally necessary is it that attorneys and counselors should be animated by a high sense of integrity. A university chancellor, and a D.D. to boot, addressing a law graduating class, stated that he himself was a member of the Bar, but had never entered the practice of the profession because, as he said: "I feared I was not honest enough." To be a lawyer worthy the name and worthy the profession, absolute honesty is demanded.

No man can be held competent to undertake the varied interests of his clients who would not rather die than steal. Equally true is it that no man can be held competent to undertake the practice of the law who does not diligently apply himself to legal study and make himself familiarly acquainted with the principles of law and of its practice in which the ethics of law are enshrined. No one can dream himself into the "gladsome light of jurisprudence." It is further true that no lawyer has the right, nor is he required to sell his conscience to his client. Rascally clients may have something to do with producing rascally lawyers. Recent developments tend to indicate that there is a spirit of lawlessness in society to-day which is prepared to intimidate the officers of the law in the proper discharge of their duties.

A serious condition of affairs exists when a judge receives letters every day threatening his life unless he deal leniently with a prisoner who did not stop to deal leniently with his victim. For a judge to fearlessly and faithfully administer the law in such a case, sterling manliness and unflinching adherence to duty are indispensable. And it should be the aim of all law-abiding citizens to support a judge in such circumstances. By so doing they protect themselves, and promote the maintenance of peaceable society, for which purpose law courts and their paraphernalia exist. It is also clear that the pardoning power vested in the executive authority of the state and nation is liable to abuse, that sorely strains the confidence of the citizens in the guaranteed security of legal procedure. Possibly a Board or Commission of Pardons appointed in each State, to consist of eminent criminal jurists, and to hold office during good behavior, irrespectively of the political party in power, might succeed in regulating this matter.

As a signal illustration of forensic success coupled with an unusual high sense of honor, justice and right, the career of Abraham Lincoln at the bar is well worthy of study. Had he never attained the unique position he did in the councils of the nation and in the hearts of the people, he would certainly have left his name on his country's roll of fame as an able lawyer. Conscientiousness marked all his career.

As a sample of this I quote one incident. A stranger called on him wishing to retain his services. "State your case," said Mr. Lincoln. The man did. Then Lincoln said: "I cannot serve you, for you are wrong and the other fellow is right." "That is none of your business if I hire you," retorted the man. "None of my business!" exclaimed Lincoln. "My business is never to defend wrong. I never take a case that is manifestly wrong." "Well, but you can make trouble for the other fellow," added the applicant. "Yes," said Lincoln, "I can set a whole community at loggerheads. I can make trouble for this widow and her fatherless children, and thereby get you $600, which rightfully belongs as much to the woman as it does to you. But I won't do it." "Not if I pay you well?" slily suggested the would-be client. "Not for all the money you are worth," Lincoln replied.

The times have changed since Lincoln with his saddle-bags and cotton umbrella rode over the Eighth Judicial Circuit of Illinois, but the principles of law and legal ethics are the same to-day as they were then.

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A REFORM IN CRIMINAL PROCEDURE.

BY CHAMPION BISSELL.

COMMON Law, as distinguished from Statute Law, is the "perfection of human reason." This is not the dictum of the writer; but it has become imbedded in educated sentiment as an axiom. And this conclusion is based not only upon the multiform and long practices of jurisprudence, but upon the very nature of the case itself. The Common Law is the slowly aggregated result of the deliberations of the most learned and upright citizens of the foremost nations of the world. These citizens, judges of the courts of last resort, have always as a rule been selected by the proper authorities because of their superior abilities and education, and have been so compensated as to set them above bribery. It is, and always has been, the function of the higher judges who make the Common Law, that they not only establish justice, but correct injustice. Injustices are continually being committed by courts of *nisi prius*, where a judge sits to lay down the law to twelve jurymen, who pass upon the facts in relation to their connection with the law; and are as continually reversed and corrected in the higher tribunals, from which alone we derive those precedents and principles which are styled the "Common Law."

Such, briefly stated, is the eulogium of the system of jurisprudence, under which the citizens of the two greatest and most enlightened nations of the world lead their lives and carry on their business. And this eulogium has always been deserved since the barons of England extorted from King John at Runnymede that great guarantee of the liberty and rights of the citizens known even to schoolboys as Magna Charta; and since trial by jury became the right of every person accused of crime or sued in a civil action. And yet the "perfection of human reason" is very far from being absolute perfection; since in strict terms there can be no such thing as perfection of an imperfect instrument. Among the great names that illustrate history,

"Beaconing from the abode where the Eternal are,"

none are more renowned than those of scholars and statesmen who have with greater or less success devoted their talents to the task of law reforms. Of such were Solon, who reformed Grecian law; Ulpian and Papinian, who reformed early Roman law; Tribonian, who reformed the law in the time of Justinian, commencing the immortal "Institutes" with these masterly definitions.

"Justice is the unvarying and perpetual intention to render to every person his due (*suum cuique*). Jurisprudence is the intelligent summation of divine and human things; the knowledge of what is just and what is unjust."

And since the Common Law came in, that is, the law as established by reason and precedents, and thus distinguished from the Civil Law obtaining on the continent of Europe as established by governmental authority, the great names of Sir Samuel Romilly and Lord Brougham will suggest themselves as benefactors of humanity in the direction of reform. The diversities of State laws and practice in the United States make sweeping reforms difficult or slow; and the most that David Dudley Field and his colaborers in the State of New York could accomplish was such a codification of precedent and practice as should reform the New York juridical system, and serve as an example to other States.

Much yet remains, and much probably

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will always remain, to be done in reforming jurisprudence in communities that are growing in numbers and intelligence, and in which new emergencies constantly arise out of new formations of circumstances. With profound deference to the general system of procedure in criminal cases as established in the courts of the United States, let a reform be suggested, which I do not remember as having been proposed by any Bar Association or writer upon legal topics.

Most readers are familiar with the leading facts of the ancient judicial combats, or trials by battle. Schoolboys find illustrations of them in such stories as the "Seven Champions of Christendom." Older and more critical students are interested in the description of this procedure in Montesquieu's "Spirit of Laws." It was absurd and irrational to the last degree. Communities that believed that the divine principle of justice could so arm a combatant weighing, let us say, a hundred pounds, and unskilled in the use of weapons; and so disarm his opponent, possessing twice his weight, and skilled in the sword; that the little man, if innocent, should slay the big man, his adversary and prosecutor, were no less ignorant than credulous.

And yet this system had one virtue which modern criminal procedure lacks: every prosecutor was obliged to appeal either in person or by substitute; every accused person was allowed the opportunity to establish his innocence. And no distinction of persons was recognized. Beaumanoir tells us that "when a gentleman, as an accuser, had a judicial combat with a person of low birth, he was obliged to present himself on foot, simply with shield and baton; but if he came on horseback and armed with a sword like a gentleman, they took his horse and his arms from him, and stripping him to his shirt, they compelled him to fight in that condition with the lowborn man."

Such a state of things would naturally cause any person not possessed of the thews and muscles of a prize fighter, or not an expert fencer, to be extremely cautious as to bringing accusations against any subject of the realm. There was a certain beauty then in this irrational structure of law erected by our remote ancestors. "They builded better than they knew." How different from, and in one respect how superior to, the procedure adopted by the enlightened communities of the United States, by which any person can, by lodging a complaint with a police magistrate, procure the arrest of any other person within the jurisdiction of the court; and the consequent indictment of the person complained of, unless the latter elects to unfold his defense, a step which counsel rarely advise; and can then, by absenting himself from the territory within the jurisdiction mentioned, forever prevent the accused person from being acquitted of the charge.

Bulwer wrote an amusing and satiric sketch of this state of affairs, entitled the "Law of Arrest." An English merchant has an agent or correspondent in Batavia, Java. He suspects that this person is cheating him; sets out for Batavia; confronts the wrongdoer in his office and taxes him with his villainy. The agent hears him with patience and civility, begs him to remain in the office a few moments while he procures vouchers from his residence, and in five minutes returns with a police officer, who serves a warrant upon the astonished merchant. Taken before the magistrate, the merchant is informed by that dignitary that the offense charged against him is an aggravated case of felony, robbery, etc., and that bail will be fixed at five thousand pounds, the merchant being a stranger in the city. The accused person is of course unable to obtain bail, the amount being excessive, and the minds of his few acquaintances in Batavia being prejudiced against him by the rumors artfully set afoot by his agent in his disfavor. Not to prolong the history, he is confined in prison a fortnight, during which time the agent collects all collectable

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funds and securities, and leaves Batavia for parts unknown. Released at last for lack of a complainant, the merchant demands justice. "But I can do no more than release you," says the magistrate, who is pretty well satisfied that the Englishman has been the victim of procedure. "And can I do nothing more?" asks the merchant. "Not so far as appears," says the justice, "unless you can catch your departed agent." "And what do you call this sort of thing?" queries the merchant. "My dear friend," the justice closes, "This is the law of arrest!"

This sketch is founded on fact; probably it was a fact that came to Bulwer's knowledge. Such events constantly happen. In December, 1892, a lawyer in good standing at the New York Bar was arrested at his office on the complaint of a woman, for whom he had brought an action to recover the sum of five thousand dollars from an insurance company. Three thousand of this he had already collected, and the suit for two thousand was pending. He had paid over two thousand to the plaintiff; and while no reasonable person would deny that this lawyer might consider a thousand dollars as a competent fee for the entire action, yet the fact that the plaintiff did not share this opinion caused him to be taken from his vocation, deprived of his liberty and arraigned before a police justice on a charge of grand larceny. Now if the fair, or unfair, plaintiff chooses to remove to some place outside of the state or county, and not appear at the trial before a competent court, what measure of justice can this defendant obtain? An acquittal? No. Merely a dismissal of the indictment, leaving the cloud of an indictment upon his reputation; dismissed indeed, but liable to be revived at the instance of the District Attorney at any time during the statutory period of ensuing years, a dismissal being a bar to an action on a misdemeanor only, and not on a felony.

The general public is apt to believe that an arrest and an indictment are *prima facie* evidences of guilt. As a matter of fact they bear the same relation to actual guilt that a casual cough bears to a deadly pulmonary consumption. From among each hundred persons arrested and brought before a police magistrate, twenty are discharged on the complainant's own showing. When the papers in the cases of the remaining eighty are laid before the grand jury, bills of indictment are found against fifty. Of these fifty, ten are never tried, because complainants fail to appear; of the forty, presumably the guiltiest of the hundred, twenty are acquitted. These ratios are not claimed to be strictly accurate, but they are the result of a long study of criminal records in the city of New York, and are closely aligned to truth. Out of a hundred accused persons, at least in the County of New York, it is a question if twenty eventually work out sentences in the penitentiary or state prison.

On the face of it then, the chances are five to one that a person, not belonging to the criminal classes, arrested on a criminal charge, is innocent; and if this is the case, or if the probabilities in his favor are only three to one, the public should be educated to a larger charity toward accused persons, and a suspension of judgment, if not a belief in their innocence, so long as the defendants remain unconvicted. Such a tolerance would be the first step in the direction of the great reform in procedure which this article is intended to advocate.

In fact there are so many conditions all working together to assist the mischievous designs of frivolous, insincere, and perjured complainants, that common justice demands that at the end of the procedure an innocent accused person should be able to command, as a matter of right, an absolute vindication; such a vindication as will restore him to society with unblemished reputation. Magistrates are only human; and police justices as a class are not selected from among the most able jurists, or even the best educated and most responsible laymen. When a complain-

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ant appears before the average police justice, the latter is apt to credit the affidavit of the former; it adds to his prestige to do so; and the more papers he sends to the grand jury, the wider is his fame as a magistrate. A warrant is issued, the defendant appears. Suddenly snatched away from his business, he is destitute of proofs of innocence, and while in a competent trial court no defendant is ever expected to prove innocence, the whole burden of proving guilt resting on the prosecutor, in a police cour the is called on to prove innocence, when least prepared to do so. The advice of counsel and the dictates of good sense alike prompt him to waive examination; that is, to reserve all grounds of his defense, and simply declare his innocence of the charge. This he does, and the papers in the case, including the complaint of the accuser in full, are sent to the grand jury, the police justice endorsing the complaint so far as to state over his signature that he finds "probable cause" to believe the defendant guilty, and therefore commits him for trial.

The functions of the grand jury are in most cases simple. They are defined substantially as follows: That the grand jury shall find a true bill of indictment against the accused person if the charge is such as would lead to a conviction if uncontradicted or not disproved. As a matter of fact almost any charge satisfies this requirement. Fewer indictments would be found if grand juries were to summon defendants to explain the charges; but such a course is not encouraged by the authorities, whose plan it is, and very properly, to secure a trial of the case.

The indictment being now filed in the District Attorney's office, the defendant is called on to plead to it; and his trial then awaits the convenience of the public prosecutor. This convenience is an unknown quantity; and, so to speak, a "movable feast." A defendant never knows on what day he may be called to the bar. And when his case is called, it is quite upon the cards that the prosecution will not be ready. Everything depends upon the presence of the complainant; and many a complainant, who is ready enough to sign his name to a lying affidavit, in which every alleged fact is distorted to his own advantage and to the prejudice of an accused person, out of which affidavit grows the "probable cause" for believing the defendant guilty, hesitates before coming into court and facing the cross-examination of some able lawyer before a jury. The complainant fails to appear; he or she is not in the county or State, and the prosecutor postpones the case. In cases where the complainant fails to appear on the first call he is very apt to continue to absent himself, until the rules of the court compel a dismissal of the indictment.

Judge Cooley was once examining a class of law students for admission to the Bar. "Give a definition of a legal axiom," he said to one of the class. "There is no legal wrong without a remedy," was the response. "Well, young man," said the Judge, "the usual enunciation of the proposition is that there is no wrong without a legal remedy; but if you have discovered a new truth, and can maintain your discovery, you will have inaugurated a millenium in jurisprudence."

But notwithstanding the sarcasm implied in these words, there should be no wrong in legal procedure without a remedy, and so long as the law of the land permits the arrest of one citizen upon the complaint of another, it should go further, and confer upon the accused person the right to elect between the dismissal of the indictment, or a jury trial upon whatever evidence may be in the possession of the public prosecutor, in all cases where, after reasonable time, the complainant fails to appear. If a defendant has been engaged in some shady transaction, questionable or against public policy, he would doubtless be satisfied with a dismissal; but if absolutely innocent, as many accused per-

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sons are, he would demand a trial, let the prosecutor read the complainant's affidavit, on which the indictment is based; and then the defendant would unfold his side of the case to the jury, take an acquittal, and go out among his fellow citizens cleared of all the clouds which have surrounded him since the accusation.

A defendant on a criminal charge does not occupy a position of his own seeking, and it is manifestly unjust that the State should place him in an attitude toward the community in which it is not prepared to maintain him. If a person has committed a felony, the sooner the State locks him up for a term of years, the better; but if he has not committed a felony, and yet has been arrested on a felonious charge, it is the duty of the State to replace him in the position previously occupied by him. Only a formal acquittal can do this. On a mere dismissal of the indictment, if the accused person brings an action against the complainant for malicious prosecution, or against a newspaper that may have published libellous comments upon the transaction, the question of his guilt or innocence is liable to be agitated in a civil court, whose procedure does not compel such a weight of evidence as a criminal court of competent jurisdiction, does not so efficiently throw the burden of proof upon the person who makes the charge, and does not confer upon a litigant the absolute right to call at least five witnesses to good character, and reputation for truth and veracity. This affords a striking illustration of the truth that one wrong generally leads to another. For certainly, next to the wrongfulness of locking up an innocent man, is the wrongfulness of turning him out again with a clouded reputaiton, and of depriving him of the only possible means of clearing away the cloud.

Prosecutors might urge that such a course of procedure as is here suggested would give infinite trouble to the courts. But this is no argument, since the citizens of a community pay the expenses of the courts, and have a right to the best justice that the courts can administer, and to the largest amount of it, and all the time. It may seem to the average District Attorney that it makes but little difference to a defendant whether he gets an acquittal or a dismissal of the indictment; in either case he goes forth a free man, his bail is discharged; he retains his citizenship; his credibility as a witness is not shaken; his legal status is not disturbed. And yet an enormous difference exists between the acquitted and the dismissed defendant.

The average citizen does not live in a large world. No matter how vast any city may be, each one of its inhabitants knows, and is known to, a limited number of people. But the fact that his reputation is confined to a limited number implies that, as to these selected few, his reputation has a certain value; and not being spread over a large area, it is the more carefully scrutinized.

This citizen, whom we will style John Doe, finds himself one day brought before a police justice on the complaint of Richard Roe, the alleged crime being, let us say, a constructive larceny arising out of a business transaction in the results of which Richard Roe may have been disappointed, and chooses to consider himself criminally injured. On the affidavit of Richard Roe, John Doe withholding his defense and waiving an examination,—the more decidedly so since the magistrate informs him that, while his statements may or may not be credited, any admissions that he may make will certainly be used against him,—he is committed for trial. An indictment follows, quite as a matter of course; and Doe prepares his evidence and engages his witnesses in the expectation of establishing his innocence at a public trial.

It is safe to say that every one of his acquaintances becomes informed of the affair, and is more or less interested in its results. Whether creditors, debtors, rela-

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tives, neighbors, or trade or professional associates, they all have a place in their memories, arranged for the denouement of the Doe-Roe case.

Richard Roe finds it convenient to go out of town and stay out, and the District Attorney abandons the action. If John Doe had been tried and acquitted, the affair would have been public, and any questions as to the result could have but one answer. But John Doe has not been tried and acquitted, so that the affair is not public; and when it gradually leaks out that he is no longer under indictment, the various Qui-his and Mrs. Grundys who make up his general acquaintance, bring forward for their common discussion and entertainment as many histories of the occurrence as were offered by Sir Benjamin Backbite, Mrs. Candor and other "friends" of Sir Peter Teazle touching his duel with one of the Surface brothers. "The indictment has been pigeon-holed"; "the indictment has been abandoned on account of a flaw"; "a *nolle prosequi* has been effected by a powerful political ally"; "a smart lawyer has so worked on the District Attorney that he has abandoned the case"; "the complainant has been bought off"; "a private settlement has been made." These are a few of the many misstatements that are liable to be set afloat and believed; since in regard to any event whatever, while the truth can only fill one straight channel, there can be a million circuitous channels, each brimming over with its own particular falsehood. And all these erroneous statements that we have mentioned are damaging to John Doe's reputation as a man and a citizen. Years of exemplary conduct will be required to live them down. In fact it often happens that a citizen never fully recovers the ground lost by such a failure of justice.

Judge Gildersleeve, now on the Supreme Court bench in New York, once instructed a grand jury, in his capacity as a judge at General Sessions, to be rigorously scrupulous as to how they brought in "true bills" of indictment, stating to them that, after an indictment was once found against a citizen, no earthly power could thereafter remove the stain. It does not follow that this is true because Judge Gildersleeve said so; but we may consider it true that the stain can never be removed except by an acquittal. An acquittal means that a selected body of citizens, brought into court as a jury, and sworn to render their verdict on evidence laid before them, have examined into the truth or falsity of the charges, and have pronounced them false. This is the highest vindication, and the only real vindication, and it is the vindication which every citizen is entitled to demand from the people of the State, who against his consent have committed him to answer a criminal charge.

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LONDON LEGAL LETTER.

LONDON, April 4, 1896.

PRACTICALLY as well as theoretically a very earnest endeavor is made to preserve the dignity and decorum of the English Courts. Not only is any attempt to comment upon a matter which is under trial sternly repressed, but even a statement as to the contents of a document in a suit which has been filed, but which has not yet come up for hearing, is so far considered to pertain to a matter *sub judice* as to bring it within the rule of contempt of court. Last month an evening newspaper published as a news item a condensed statement of the contents of a petition, or statement of claim, in an action brought in the Queen's Bench. It was represented to the editor and proprietor of the paper that this statement of claim contained allegations many of which were immaterial and of a most damaging description; whereupon the editor apologized and made an affidavit stating in effect that he was surprised to see the item in his newspaper, that it had been brought to him just as he was about starting on a journey and that he had given it to the sub-editor with an instruction to be very careful about it. It was not suggested that there was anything in the newspaper item that was not in the petition; nevertheless a motion was made for a writ of attachment to issue for contempt of court for printing and publishing "certain statements calculated to prejudice the fair trial of the action and the defendant in the eyes of the public." The motion was heard last week. A leader and a junior appeared for the motion, and a leader and a junior for the newspaper, and two judges considered it. For the motion Mr. Carson, Q. C., urged that "the authorities showed that a publication of an *ex parte* statement, such as a statement of claim, not supported by any evidence, and before the trial came on, was a contempt of court. If such a thing could be done no one was safe. All that a man had to do was to file an action against a public man, draw up a statement of claim containing any matters of prejudice he might choose to invent, and then threaten to make public the statement of claim." This of course is all very true, but it is I fear novel doctrine in the United States, where too often a defendant is persuaded to agree quickly with his adversary, not because his adversary's claim is a just one, but because he fears the publication, with head-lines, of the petition before the answer, which will probably never be published at all, can be filed. In this particular case the judges argued that "it was shocking that newspapers should publish such matters as this, which had not been before any court of justice, that it was interfering with the course of justice and that it was inexcusable"; but as the newspaper proprietor had apologized, no other punishment would be inflicted upon him than to adjudge him in the costs of the application — which is equivalent to fining him from $500 to $750, so great are the costs of litigation here.

Another movement in the direction of greater gravity and decorum in the conduct of trials here is the bill which has recently been introduced by the Lord Chancellor in the House of Lords, giving judges the right to exclude the public from trials which for decency's sake ought not to be held in public. The bill has met with some opposition, but it will be passed and will prove a useful measure. It is almost impossible for one who has not witnessed it to conceive of the craze which society women have for the details of sensational trials, and the lengths to which they will go to gain admittance to the courts when any matter of society interest is on the docket. Not only are those parts of the court-room which are ordinarily set apart for the public over-crowded, but counsels' seats are invaded, and in many instances the bench itself is occupied by fashionable women in gay toilets. In a case which was tried not long ago, in which the parties were conspicuous members of the highest social circles, and royalty was called into the witness-box, many women were admitted to places specially reserved for them before the doors were opened to the public, and in order that they might not lose these positions they brought their luncheons with them and remained throughout the day. In the more recent examinations of Dr. Jameson and his associates at the Bow Street police court, the demand for places by titled ladies has been a serious annoyance to all the numerous counsel engaged, and to the officers of the court. In fact the throng was so great that several of the counsel were unable to get to their seats, but had to take their notes on their knees and be satisfied with such glimpse of their clients and the judge as they could get by peering around the intervening screen of wide-spreading bonnets.

Few actions of recent years have attracted as much attention, not only on account of the prominence of the parties and the romantic character of some of the incidents, but by reason of the intricate question of law involved, as the case of Kitson *v.* Playfair, which has just been tried by Sir Henry Hawkins and a jury. The plaintiff is the wife of Mr. Archer Kitson, who is the brother of Sir James Kitson, a wealthy Yorkshire baronet, and the defendants are Dr. Playfair, one of the most eminent and fashionable West-end physicians, and Mrs. Playfair, who is the sister of Sir James Kitson. The plaintiff had not been in her husband's company for two years when in 1894 she called a Dr. Williams to attend her. He requested that Dr. Playfair be called into consultation with him, to which Mrs. Kitson willingly assented, remarking that Dr. Playfair was her husband's brother-in-law. At a second consultation an examination was made under chloroform, and while recovering consciousness, Mrs. Kitson heard something said by Dr. Playfair which implied that her illness was the result of misconduct on her part, or, in other words, of a miscarriage, and that the signs indicated a pregnancy of three months. Mrs. Kitson indignantly denied this and appealed to Dr. Playfair to grant her an interview in order that she might tell him what had happened and thus clear her character. Dr. Playfair refused the request, repeated that he had no doubt of his diagnosis, and said that it would be his duty to inform his wife about the incident in order to pre-

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vent any social intercourse between the families, unless Mrs. Kitson would either consent to go away from London to live or would assure him that she had had intercourse with her husband within three months, a fact that Dr. Playfair considered to be impossible, as Mr. Kitson had been out of England for several years. Mrs. Kitson pleaded that time be given to her in order that she might communicate with her husband, but Dr. Playfair refused, and, as Mrs. Kitson determined not to go away from London, he informed his wife, who in turn told her brother, Sir James, what had occurred. In consequence of the communication, Sir James withdrew an allowance of £400 a year which he had been paying to Mrs. Kitson, leaving her totally destitute. It was for this statement that Mrs. Kitson brought her action against the Playfairs for libel and slander. The doctor pleaded that he had never made the statement in question (but subsequently abandoned this line of defence), and, further, that it was made as a matter of duty, to protect his wife and children, without malice and in an honest belief that it was true, thus claiming privilege for it. He did not claim justification, and therefore the court refused evidence as to whether or not the statement was true, although Dr. Playfair insisted that he not only believed that it was true at the time, but that no medical authority could shake his faith in his own judgment. On the other hand another eminent physician swore that the facts of the case did not warrant the judgment which Dr. Playfair and Dr. Williams had formed about them. In the end, and after a very long review of the whole question of what constitutes privilege by the judge, the jury found a verdict for the plaintiff for £12,000, or $60,000, — an enormous sum and one which if capitalized would yield about what Mrs. Kitson had lost in the withdrawal of her allowance by Sir James. Very little has been added to the law on the subject of privilege by this trial and the judgment, but it is very doubtful if fashionable physicians hereafter will give their professional confidences to their wives and the other members of their families.

It is announced here that the Lord Chief-Justice has accepted the invitation of the American Bar Association to attend its next annual meeting at Saratoga Springs in August, and that he will be accompanied by Sir Frank Lockwood, Q. C., M. P., Mr. Montague Crackenthorpe, Q. C., and Mr. James Fox. This is not the first visit of Lord Russell to the United States, as he visited America in the company of the late Lord Chief-Justice. He will, of course, be heartily welcome, and I am confident that he will make a capital impression among his hosts. He has not the courtly grace and the extreme *suaviter in modo* which distinguished Lord Coleridge, but he has the bearing and dignity of a judge, while at the same time he has not yet been long enough on the bench to lose that peculiar charm of advocacy which made him one of the most sought-after and successful jury lawyers the English Bar has ever known. In Sir Frank Lockwood he will have a fitting companion. As an after-dinner or a platform speaker, Sir Frank is quite the equal of Lord Russell. He is full of humor and anecdote, and of so jovial a nature that the public is not always inclined to take him seriously even when he desires to be most impressive. He is besides one of the conspicuous successes of the Bar, and has as much work as any leader on the common law side, Sir Edward Clarke, of course, always excepted. In Mr. Montague Crackenthorpe you will see a typical chancery lawyer, in figure, address and keenness of intellect. He came to the bar nearly forty years ago with a studentship, and has been a student ever since. He has the social grace well developed also, and is in many respects a fit companion for the other two almost incomparable ambassadors from the English to the American Bar.

The English Parliament does not try election petitions, but remits them to the courts for determination. So far, growing out of the elections last year, there have been eight petitions decided by the courts, and as two judges sit, and the proceedings are strung out to interminable length, great inconvenience has been experienced in getting through the regular litigation. One of these petitions, that of Benn *v.* Marks, has already extended over forty days, and promises to drag on for another fortnight. The defeated candidate brought nearly 150 charges against his successful rival, who as a sort of moral counterclaim filed a recriminating charge. The judges have decided in favor of the sitting member on the petition and on the recriminating charge also; and now there is to be a scrutiny of the ballots. The costs thus far are upwards of $150,000, the leader on Marks' side getting a "refresher" of $200 a day, and on Benn's side $150. In addition to these leaders there are two juniors on each side who have likewise to be daily "refreshed," besides solicitors and witnesses without number. The judges have intimated that they consider the matter of costs in these cases little short of a scandal.

STUFF GOWN.

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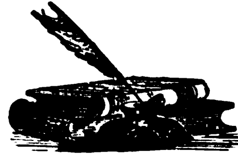
The Lawyer's Easy Chair.

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

.·. .·. .·. .·. .·. **BY IRVING BROWNE.** .·. .·. .·. .·. .·.

CURRENT TOPICS.

A NOVEL RUSE. — A novel and very ingenious expedient to save a murderer from execution was devised in the recent case of "Bat" Shea, who was convicted of the murder of Robert Ross, at Troy, N. Y. Shea was a young Democratic rough, employed, or at least engaged, in deterring Republicans from voting on election day. He had an associate named McGough. Ross and his brother William were regularly constituted Republican watchers at the polls. There was a conflict between the Ross brothers and Shea and McGough, in which Robert was killed and William was seriously assaulted. Shea and McGough were indicted for these offenses, and Shea was convicted of the murder of Robert, while McGough was acquitted of that offense but convicted of the assault on William, and sent to prison. On the trial concerning Robert, McGough swore that Robert was killed by Borland, but Borland was not even indicted for the offense, it appearing that he was a Republican trying to assist Robert. Fifteen reputable and disinterested persons swore that they saw Shea fire deliberately twice at Robert at close quarters, and that neither Borland nor McGough did it or was in a position to do it. This result was accomplished in spite of intimidation and bodily violence toward some of the witnesses. Shea's case was taken to the Court of Appeals, and his conviction was unhesitatingly affirmed, the opinion being written by the Democratic judge, Peckham, who used very severe and significant language about supposed political inspirers of the crime. (Some, or at least one, of the witnesses testified to overhearing a conversation between the accused and others, indicating that they were set on by persons higher in authority to get rid of the Ross brothers by violence, if necessary to effect fraudulent voting.) After the affirmance of the conviction, a strenuous attempt was made to induce the Governor to commute the sentence to imprisonment for life, but without avail. About the time that this attempt was instituted it was announced in an Albany newspaper that McGough was ready to confess that he was the murderer, but nothing more was heard of it until the Governor's decision was announced. Then it was heralded by the prison authorities that McGough had confessed to them, and the Governor was induced to appoint a commission to take his sworn statement and to respite Shea. Counsel then made a motion for a new trial, based on this confession. It was heard before a Democratic judge, and after a careful examination was denied, the judge being convinced that it was incredible and perjured. Shea suffered the extreme penalty of the law, asserting his innocence to the last. A more desperate and artful attempt to defeat justice was never devised, and that it was unsuccessful is a demonstration of the capability of judges chosen by popular suffrage to rise above political bias and associations. McGough was perfectly safe in his confession, because he had been acquitted of the murder; if he had not been, there would have been some reason to believe his story. The lesson is a wholesome and much-needed one, and especially as addressed to the locality where these events occurred, and it probably will be heeded by those high in office and power as well as by the humble and base creatures through whom such desperate acts are compassed. No murder case in New York in recent years has created so much excitement and popular indignation. Robert Ross is regarded as a martyr, fallen in the cause of popular rights, and a monument is being erected over his remains by the women of Troy. On the other hand, the funeral of his murderer, at Troy, was attended by an immense concourse; thousands viewed the remains; great quantities of flowers and floral devices — some spelling "Innocent" — were contributed, especially by the "collar-girls"; a long procession followed to the grave, and many knelt in the snow. The affording of the opportunity for such a morbid demonstration was a mistake on the part of the public authorities. The humane and wise priest who ministered to the deceased in his last moments and at his grave, substantially deprecated this outburst and by no means asserted his belief in Shea's innocence. Shea's death was more to be commended than his life, for he professed penitence and a spirit of forgiveness. His life has afforded a longer printed record than that of many benefactors of mankind, for the printed case

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on the final appeal extends to twenty-three hundred pages.

LAWYERS' SPORTS. — An appropriate supplement to a recent paragraph in this Chair on "Legal High Jinks" may be found in an account in the "London Law Journal" of "Chess in the Inns of Court." In old days it was the fashion to play checkers in the bar-rooms of country taverns, and now it seems the fashion to play chess in the bar-rooms of the Inns of Court, the more aristocratic nature of the game being suited to the superior dignity of the buildings. The Benchers of the Inns and Middle Temple gave a chess entertainment, in which professional and amateur players participated. The Lord Chief Justice, "with a number of ladies and other persons of distinction," was present. One professional played against thirty-one separate opponents simultaneously, and won a majority of the games. Consultation games were played by Templars. "Wot games!" as Sam Weller would say. From a recent number of the "Canadian Law Times" we learn that in Ontario attendance for two years at the law school at Toronto is exacted from candidates for the Bar, and that the students are demanding a gymnasium. The "Times" says: —

"We understand that a petition has been presented by the students of the Law School to the Benchers of the Law Society, asking that they utilize the third story of the Law School as, and fit it up for, the purposes of a gymnasium. We trust sincerely that the petition will be granted. No more popular and worthy act could be done for the school then to provide the means of exercise and enjoyment for the students. The Benchers will readily see that the conditions of to-day are entirely different from those of a few years ago. Under the old system there was no compulsion to attend at Toronto except for examinations. Students who preferred to study in Toronto came here voluntarily. Under the present conditions it is compulsory on all students to spend at least two years in attendance at the Law School. They are gathered together in a small society by the Benchers, and we conceive that it will not be disputed that the responsibilities of the Benchers do not end with the mere instruction in law."

If a candidate for the Bar is required to attend a law school, by all means give him a "gym." At the same time one must wonder how so many good lawyers have been produced without law schools or gymnasiums. Imagine Grover Cleveland trotting around the course or Evarts swinging on the trapeze!

NOTES OF CASES.

IMPOUNDING EXHIBITS. — A novel case is Newberry *v.* Carpenter, Supreme Court of Michigan (Dec., 1895, 65 N. W. R., 530). A steam boiler exploded on the premises of relator, completely wrecking the building, causing the death of 37 persons, and injury to others. The calamity was alleged to have been caused by the criminal negligence of the engineer. The Circuit Judge of the district, on motion of the prosecuting attorney, ordered the boiler and engine into the custody of the police, but not to be removed from the premises, to be used as evidence on the contemplated trial of the engineer for manslaughter. The Supreme Court, on a petition for *mandamus* (McGrath, C.J., dissenting), held that the order of the Circuit Judge was without authority of law and must be set aside. It was shown that the owner of the building, although charged with no crime, was threatened with civil suits for damages on the ground of negligence. "Not only therefore is she by this order deprived of her private property, which she may desire to use in her business, but may be deprived of the evidence which may establish her innocence of any fault."

This seems to be a case in which evidence of the condition of the boiler by experts was feasible and competent, and would answer a better purpose than an exhibition and inspection of the boiler. There can be no doubt that the State has a right to impound exhibits for use as evidence in criminal cases, but it seems reasonable to limit the exercise of the power to cases where it will not result in serious deprivation of property rights. If a man were accused of murder, the State might unquestionably possess itself of his shoes in order to fit them to footprints, but it is extremely doubtful whether it might turn him out of his house or shop, the alleged scene of the crime, and take exclusive possession of it for purposes of evidence. The right of search would answer every purpose.

INJUNCTION. — BENEFIT EXCEEDING INJURY. — The New York Court of Appeals, in a very recent case, O'Reilly *v.* New York Elevated Company, held that where the plaintiff had suffered discomfort and annoyance from the operation of the defendant's road by deprivation of light, air and access, but that a general benefit had been produced by the presence of the road, in which the plaintiff's property participated, and that the plaintiff had suffered no substantial loss in consequence of its construction and operation, equitable relief would not be granted. On the doctrine of injunction to restrain trespass, the Court quoted Chancellor Kent, in Jerome *v.* Ross, 7 Johns. Ch. 315: —

"I do not think it advisable, upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong and aggravated instances of trespass, which go to the destruction of the inheritance, or where the mischief is remediless. I do not know a case in which an injunction has been granted to restrain a tres-

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passer, merely because he was a trespasser, without showing that the property itself was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass. These cases all show that, in respect to acts of trespass committed upon land, even by persons in a public trust, under color of law, the Court has not interfered by injunction, unless where the trespass was permanent, as well as grievous, or went to destroy the value of the property to the owner. It is not sufficient that the act be simply *per se* a trespass, but it must be a case of mischief and of irreparable ruin to the property in the character in which it has been enjoyed."

The Court also cited Kerlin *v.* West, 3 Green, Ch. (N. J.), 440. The Court tested the plaintiff's rights by considering what they would have been in condemnation proceedings by the defendant, and argued that as he would have had no standing in such proceedings, because he had suffered no loss, but on the other hand had acquired benefit in the enhanced value of his land, so he should not be enabled to restrain the operation of this beneficial enterprise. This is a plausible contention, but suppose the plaintiff does not desire to sell, and thus realize the alleged enhancement of value; suppose the premises constitute his old home, and he desires to live and die there in peace; may he be thus annoyed and harried by a corporation that did not choose to condemn his land, but took their chances on his power to recover damages? Gray, J., is quite correct in his admission that "there may be some embarrassment in reconciling" all the decisions of Courts upon this point.

Dying Declarations. — "The Harvard Law Review" and the "New York Law Journal" have fallen into a very courteous quarrel over the question whether dying declarations are impeachable by proof of contradictory previous statements by the deceased. This arises upon the cases of People *v.* Lawrence, 21 Cal. 368, and State *v.* Lodge (Del.), 33 Atl. Rep. 312. These comments raise an interesting query as to the weight to which dying declarations are entitled. On the one hand extreme sanctity may be attributed to them on account of the solemnity and responsibility of the occasion; on the other hand, that occasion may give an excellent opportunity to an unscrupulous man to wreak a posthumous revenge. It should seem that this species of evidence ought to be open to every contradiction and impeachment to which other evidence is subject, and that no extraordinary weight or sanction should be attributed to it. It is always *ex parte* and self-serving, and never under oath, and never subject to cross-examination.

Some courts have gone so far as to hold that dying declarations are not receivable in favor of the prisoner; but the contrary has been held, and appears the better doctrine. Moeck *v.* People, 100 Ill. 242; 39 Am. Rep. 38; Com. *v.* Matthews, 89 Kentucky, 287. That contradictory statements are receivable to impeach them is held in Felder *v.* State, 23 Tex. App. 477; 59 Am. Rep. 277; Morelock *v.* State, 90 Tenn. 528; State *v.* Burt, 41 La. Ann. 487; 6 L. R. A. 79; Com. *v.* Cooper, 5 Allen 495; Goodall *v.* State, 1 Oreg. 333; State *v.* Elliott, 45 Iowa, 486. *Contra:* 1 Vroe *v.* State, 20 Ohio St. 472. In the Felder case the Court observed: —

"Dying declarations derive their admissibility as evidence from the necessity of the case. They are generally made to the friends of the deceased, and under circumstances where the physical conditions and surroundings of the declarant are such that cross-examination is impossible. Made under a sense of nearly impending death, the awful solemnity of the occasion stamps them with the verity which attends statements made under the sanction of an oath. But the allowance of them is a jealously guarded concession to the ends of human justice. That this is so is evidenced by the requirements as to predicate for their introduction, and also by the limitation upon their admissibility to the identity of the perpetrator and the circumstances of the crime. The oath may be dispensed with, but no circumstances of extremity can compensate the want of a cross-examination. They are themselves hearsay testimony, and as has been said, their admissibility springs out of the necessity of the case. But after admitting them, it would be a perversion of all right reasoning to deny an accused a like relaxation of the rule, the occasion for it being produced by a coincident and co-extensive necessity. If the State may invoke a departure from the ordinary rules of evidence upon the ground of necessity, would it not be a hardship to deny the same to the accused when the necessity has been put upon him by the concession made to the State?

"'Statements by the defendant,' says Mr. Bishop, 'contradictory of dying declarations, and contradictions in the latter, may be shown to detract from their weight with the jury.' Bish. Crim. Proc. 1209. The same doctrine is asserted in a long line of adjudicated cases. McPherson *v.* State, 9 Yerg. 279; Moore *v.* State, 12 Ala. 764; People *v.* Lawrence, 21 Cal. 368."

In a recent case in the New York Court of Appeals, People *v.* Kraft, an indictment for manslaughter by abortion, the deceased made an *ante-mortem* statement to the Coroner while at the hospital to which she had been removed, which was admitted on the trial as a dying declaration. The trial judge, in charging the jury, said that such declaration was competent testimony for them to consider, and added: "It is your duty to take it into consideration because it is evidence for you, and it is given all the sanction of evidence which the law can give to evidence." Such instruction was held reversible error. The Court, Judge Gray writing the opinion, said: —

"It is of course true that such declarations are considered to be equal to an oath taken in a court of justice; but that is because of the circumstances surrounding them when made. It is assumed that, being made in extremity,

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when the party is at the point of death and believes that all hope in this world is gone, they have some guarantee for their truth in view of the solemnity of the occasion; or as much as an oath in Court would have. But it is clear that their value as evidence rests upon an assumption, and hence it is that while the law recognizes the necessity of admitting such proof on a par with an oath in a court of justice, it does not and cannot regard it as of the same value and weight as the evidence of a witness given in a court of justice, under all the tests and safeguards which are there afforded for discovering the truth — the object of judicial inquiry. For there the accused has the opportunity of more fully investigating the truth of the evidence by the means of cross-examination, and the jury have the opportunity of observing the demeanor of the person whose testimony is relied upon. The power of cross-examination is quite as essential, in the process of eliciting the truth, as the obligation of an oath; and where the life, or the liberty, of the defendant is at stake, the absence of the opportunity for cross-examination is a serious deprivation, which differentiates in nature and in degree the evidence of a dying declaration from that which is direct and given upon the witness stand. Where, as in the present case, the evidence to convict the defendant is contained in an *ante-mortem* statement of the deceased, while it is entitled to be considered as having the weight of an oath, it would be wrong to say that it had all the weight which the law can give to evidence." "Speaking in a strict sense, the sanction of an oath and the sanction of such declarations are deemed to be the same, when the state of mind of the person is considered; but as it was said by Baron Alderson, in Ashton's case (2 Lewin, 147), 'though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination.' This defendant denied having practiced an abortion, and testified as to statements by the deceased and as to facts which, if the jury had believed her, would have resulted in her acquittal. It was therefore of the utmost importance that the jury should not receive the incorrect impression that, however admissible in evidence the dying statement, it was as valuable or as authoritative for the purpose of proving the defendant's guilt as though the inculpatory evidence had been given by a witness in a court of justice and with every opportunity to the defendant to investigate its truth by means of cross-examination."

We cannot conceive any reason for the "Review's" doubt of the "soundness" of the doctrine that such declarations are impeachable by proof of previous contradictory statements. They ought to be so impeachable even more than ordinary declarations.

INHERITANCE BY MURDER. — In Ellerson *v.* Westcott, 148 N. Y. 149, this topic was passed upon. An heir-at-law brought a suit for partition of lands devised to the defendant, who was charged with having murdered the devisor. The Court held the action non-maintainable, saying: "The devise took effect on the death of the testator, and transferred the legal title and right given her by the will. The relief which may be obtained against her is equitable and injunctive. The Court, in a proper action, will, by forbidding the enforcement of a legal right, prevent her from enjoying the fruits of her iniquity. It will not and cannot set aside the will. That is valid, but it will act upon facts arising subsequent to its execution and deprive her of the use of the property." This was explicitly put on the ground that the murder did not render the "apparent devise void," in the language of the statute of partition. The Court cite Riggs *v.* Palmer, and steer clear of it by saying: "The statute is our only guide, and having reached the conclusion that the facts alleged, if true, did not render the will void, the statutory condition does not exist which enables the plaintiff to bring that issue into this case. Section 1537 excludes by necessary implication a contest in partition between a plaintiff claiming as heir and a devisee in possession, except when this 'apparent devise is void,' and that is not this case." It is not candid in the "Harvard Law Review" to say that this case does not "expressly overrule" Riggs *v.* Palmer. The Court expressly say, recognizing that authority, that a court "will defeat the fraud by staying her hand and enjoining her from claiming under the will." Riggs *v.* Palmer was an action to have the will cancelled and annulled so far as it devised and bequeathed property to the murderer. There is not the slightest criticism of that doctrine, but an express re-affirmance of it in the last case. We hope the day is far distant when this court shall hold that a murderer may inherit or take under the will of his victim because the statutes have not said he shall not!

INCRIMINATING TESTIMONY. — One of the most important decisions of the United States Supreme Court, for several years, is that just announced in the Brown case, that a witness may not plead his privilege to refuse to give evidence on the ground that his testimony may tend to criminate him, under a statute that expressly provides that it shall not have that effect. This decision was made under the Interstate Commerce Act. The Commissioners have been greatly embarrassed by the refusal of witnesses to testify before them on this ground, and in many cases justice has been defeated or jeopardized. State decisions on the point have been conflicting, but this judgment settles the rule for all Federal cases. That the question is easily debatable and not free from reasonable doubt, is evident from the fact that it is established by a majority of one — four judges dissenting. We shall await the publication of the opinions in full with interest.

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The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

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

THE GREEN BAG.

Editor the "Green Bag."

I have read with great pleasure and satisfaction Hon. Charles Hamlin's interesting sketches of the late Jonas Cutting and Edward Kent; so long associate justices of the Supreme Judicial Court of Maine. I have a reminiscence of Judge Cutting which I think will be of interest to the profession and have a salutary influence upon those members of the Bar who have an inclination to indulge in personal invective.

An important case occupying several days was being tried in the Supreme Judicial Court of Knox County, Maine, at the March term of 1873, presided over by Judge Cutting. Two able counsel were pitted against each other, who had during the progress of the trial become very bitter and hostile, and had indulged in many personal epithets unworthy their distinguished ability and learning. When the Judge charged the jury he criticised the course pursued by the counsel in the following incisive and effective but scholarly manner: —

"Now, gentlemen, the arguments of the counsel in this case have been very able upon both sides. I have known these gentlemen for many years. I admire them as jurists. I admire their eloquence as advocates. But at the same time there has been exhibited to you in this trial a certain element which I regard as extremely objectionable, because it has had no tendency to aid in disclosing the truth which we are seeking to arrive at. The object of counsel should be to argue upon the evidence and to present the facts in the case, and not to charge each other with opprobrious epithets. That has nothing to do with the case. It does not disclose anything which you can consider on the case. It is crimination and recrimination, and tends only to satisfy the morbid sensibilities of a portion of the audience. If they would study human nature; if they would study Shakespeare, who has disclosed the nature of the mind perhaps better than any other author, they would then perceive that such epithets are detrimental and make no part of the attributes of any orator.

"You all recollect, if you have read Roman history, that Brutus, who pretended to be a great patriot, murdered his emperor, Caesar. That scene has been described by Shakespeare. There was Antony, who was hostile to Brutus, inimical in every respect. He delivered the funeral oration over Caesar, his deceased emperor. Did he, on that occasion, vituperate and charge Brutus as being an assassin, a murderor or a traitor? No. He knew better than that. That would create indignation among the Roman people. Brutus had his friends and Antony knew it. And what did he say? He said Brutus was an honorable man. Now, if counsel would only recall that speech, however hostile they may be to each other, and say they are all honorable men, it would be far more respectful and would give far greater weight and force to their arguments than to call each other villains, or apply to them any other opprobrious epithets: because that is language which anybody can use, however low and degraded he may be. Those epithets are vulgar and never should be introduced in a court of justice. If the facts disclosed in the evidence will not disclose the character of the parties, nothing that counsel can add will do it." T. R. SIMONTON.

Camden, Me.

LEGAL ANTIQUITIES.

THE *Coronator* (coroner) is so called because in ancient times his business principally was with pleas of the crown. The office was instituted in Richard I's reign, in 1194, when the coroner was ordered to be elected in every shire by the freeholders of shire. This office was soon deprived of its principal dignities; for by Magna Charta it was enacted that no coroner should hold pleas of the crown, these being expressly reserved for the justices in eyre. The statute *De officio Coronatoris*, of 4 Edward I, Stat. 2, laid down in detail the position and duties of a coroner.

FACETIAE.

WHEN Judge ——, of the North Carolina Supreme Court, was on the circuit bench some years since, an action for damages sustained by an

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assault and battery was tried before him. The usual issues were submitted, i. e., "1. Did defendant wrongfully assault and beat the plaintiff? 2. What damages did the plaintiff sustain?" The jury, after full consideration, returned as their verdict *No*, to the first issue, and twenty-five dollars in response to the second. The judge, in some surprise, asked the foreman if there was not some mistake, as the findings seemed to be inconsistent. "No, your honor," was the reply, "we found that the defendant very properly and justly beat the plaintiff, as he ought to have done under the provocation given, and that he beat him twenty-five dollars' worth. We do not think the punishment he gave the plaintiff was cruel or excessive for calling the defendant a d——d liar."

About the time of the passage of the Stamp Act, making null and void unstamped instruments, a suit was brought in Louisiana, on a plain, *verbal* contract, satisfactorily proven. The defendant demurred because the contract *was not stamped.* Plaintiff's counsel insisted upon the impossibility of the thing, but the Court said: "While it might work a hardship, yet law was law, and he should have to sustain the demurrer."

It was one of the delights of the late Lord Coleridge to profess ignorance of things supposed to be of common knowledge. In a newspaper libel action his lordship, in his most silvery tones asked, "What is 'Truth'?" "It is a newspaper, my Lud," replied counsel. "Oh!" said his lordship, preserving his simplicity and splendid gravity; "isn't that an entirely new definition?"

NOTES.

Luther R. Marsh and Ogden Hoffman were opposed to each other in a murder case, some half century ago. Mr. Marsh is now in his old age one to whom may be applied the lines about Hamlet, — "See what a noble mind is here o'erthrown," — but Ogden Hoffman has been dead nearly half a century. He was a wondrous orator, and anticipating the effect of his eloquence, Mr. Marsh said to the jury, "You will soon listen to one at whose bidding instant creations, mighty embodiments of thought and argument, sublime conceptions, glowing analogies, and lively imagery will burst as by miracle from the crystal deep of mind in overpowering forms of majesty and power." In his address, Mr. Hoffman thus parried: "He has decked me with roses and crowned me with laurel, that he might strike me on the head with a classic and consecrated axe."

Judge William Kent was of a most sprightly disposition, even when martyred by the gout. Near him in Ascension Church was the pew of a brother lawyer remarkable for his ponderosity of manner and slow, deliberate speech. In making responses to the service, his voice was always heard last, and generally awkwardly staccato. Leaving the church together one day, Judge Kent observed: "Why is it, in saying the Credo, you 'descend into the place of departed spirits' several seconds after the rest of the congregation?"

After being legislated off the Circuit Bench by a new Constitution creating new judicatures, he was under the new system often constituted a referee. Often impatient to leave for his beloved rural residence, he wrote during a hearing, on the brief of one of the counselors: —

While these lawyers are giving me "words, words, words,"
As unto Polonius Hamlet said,
I am thinking — aye thinking ever instead
Of the sunshine and flowers and singing of birds.

The autographic impromptu lines are still treasured by the possessor.

Ex-Chief-Justice Charles P. Daly, of New York, who, technically convicted by the Constitution of having lost memory and legal ability because over seventy years of age, is now in active practice as *jurisconsult*, with head and heart as young as ever, has many comic reminiscences of his forty years' continuous experience on the bench. During that long period he had naturalized ten thousand citizens. He was always punctilious in putting questions to applicants and their witnesses. Asking one of the latter whose eyes brimmed with Hibernian wit whether the applicant was respectable, he answered: "Very much so, your Honor; he never had a law-suit during the tin years I've wot on him." An applicant asked if during his residence he had been out of the United States, he answered, "Only onst, your Honor, when I crossed the ferry into New Jersey."

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Government, a Christian government, gives us a feast every now and then; it agrees, that is to say, a majority in both houses agree, that for certain crimes it is necessary a man should be hanged by the neck. Government commits the criminal's soul to the mercy of God, stating that here on earth he is to look for no mercy. Keeps him for a fortnight to prepare, provides him with a clergyman to settle his religious affairs (if there be time enough, but government can't wait), and on Monday morning, the bell tolling, the clergyman reads out the Word of God: "I am the resurrection and the life"; "The Lord giveth, and the Lord taketh away"; the government agent seizes the prisoner's legs and another human being is strangled according to law. — *Thackeray.*

LITERARY NOTICES.

The Atlantic for April contains a third article upon Presidential Candidates. The Presidency and Senator Allison is discussed with the same high, non-partisan spirit which characterized former articles upon Mr. Reed and Secretary Morton.

President Andrews's great serial history of "The Last Quarter-Century," an enterprise that has met with increasing success, is concluded in Scribner's Magazine for April. This installment is entitled "The Democracy Supreme" and brings the narrative down to the overthrow of Tammany and the President's message on the Venezuela Question. It is announced that the author will revise and enlarge the work, and it will then be issued in book form with many additional illustrations.

The Century for April contains a paper by Victor Louis Mason of the War Department entitled "Four Lincoln Conspiracies," which presents a large amount of new material relating to the assassination of the President, and a quantity of illustrations, many of them from the secret archives of the War Department.

The April Arena is peculiarly strong. Its one hundred and seventy-six pages are literally crowded with live, vigorous, able and wide-awake discussions of present-day subjects, covering a wide range of research. Justice Walter Clark, LL.D., continues his scholarly paper on "Mexico in Midwinter," which is profusely illustrated with admirable half-tone illustrations.

Is the expansion of the British Empire fraught with danger to the United States, and hostile to the interests of civilization at large? Is the policy of Great Britain, as "a land-grabber," and as a ruler of alien peoples in all parts of the world, one which must be execrated and opposed by Americans? These questions are considered by Mr. David A. Wells in the North American Review for April, in an article entitled, "Great Britain and the United States: Their True Relations." Mayo W. Hazeltine in the same number discusses the "Possible Complications of the Cuban Question," indulging in some very interesting speculations regarding the international alliances which might be formed should Spain declare war against the United States.

The names of David A. Wells, Herbert Spencer, and Cesare Lombroso on the cover of Appleton's Popular Science Monthly for April at once arrest our attention. Mr. Wells in this number brings his account of "Taxation in Literature and History" down through the middle ages, and shows that squeezing the Jews was then the makeshift for a financial system with many European potentates. Mr. Spencer concludes his series of papers on "Professional Institutions" with a general review of the subject, calling attention to the necessity in past times of domination that now appears irksome to many, and showing how useless are statutes that do not conform to the natural laws of society. Prof. Lombroso has written for the Monthly an account of "The Savage Origin of Tattooing," showing also its development among criminals. Pictures of the highly decorated bodies of three malefactors illustrate the text.

The March issues of Littell's Living Age give the usual feast of good things brought from the fields of history, biography, discovery, travel, romance and poetry. Among the many valuable papers which appear in these numbers may be mentioned: "John Stuart Blackie," by A. H. Miller; "Our Limited Vision and the New Photography," from the "London Lancet"; "Reflex Action, Instinct and Reason," by G. Archdall Reid; "A Sister-in-Law of Mary Queen of Scots," from "Blackwood"; "The Two Dumas," by C. E. Meitkerke; "The Evolution of Editors," by Leslie Stephen; and "Florian," by Augustus Manston.

In Lippincott's Magazine for April, I. J. Wistar, in a brief but very solid article on "Penal Administration in Pennsylvania," tells what has been done and what may or should be done in the way of prison reform.

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The Review of Reviews is almost indispensable to the general reader who wishes to keep abreast of the rapidly developing international questions of the day. In the April number there is a full and able editorial discussion of the complicated African situation, which is described as "the drama of 'Europe in Africa.'" The mixed interests and motives of England, Russia, Italy and France in the Dark Continent are clearly set forth. Russia's general attitude toward the European powers is also discussed, and the editor comments briefly on America's relations with Spain, our interest in the Cuban revolution, and the present status of the Venezuelan boundary dispute.

A new romance by Anthony Hope begins in the April McClure's. It is a tale of novel and thrilling adventure, like the "Prisoner of Zenda," and is said to be even more engaging than that, in both character and incident.

BOOK NOTICES.

LAW.

A Treatise on Pleading, Practice, Procedure, and Precedents in Actions at Law and Suits in Equity. By Samuel Maxwell of the Supreme Court of Nebraska. Sixth Edition. State Journal Co., Lincoln, Neb., 1896. Law sheep. $6.00.

Judge Maxwell has rewritten and rearranged a large portion of this treatise, so that the work is now much more serviceable and complete than heretofore. The fact that six editions have been required to meet the demand for the book speaks volumes for its merits.

The American Corporation Legal Manual. Vol. IV, to January 1, 1896. Honeyman & Co., Plainfield, N. J., 1896. Law sheep. $6.00.

This is a compilation of the essential features of the statutory law, regulating the formation, management and dissolution of general business corporations in the United States and other countries. The laws of the several states and foreign countries are fully stated, and many helpful forms are given. Attorneys, corporation officers and business men will find the volume very useful.

A Treatise on The American Law of Attachment and Garnishment. A complete statement of the general principles applied by courts of review and of the common rules governing the practice under all statutes. By Roswell Shinn of the Chicago Bar. The Bowen-Merrill Co., Indianapolis and Kansas City, 1896. Two vols. Law sheep. $12.00 *net.*

Mr. Shinn has given the profession an exceedingly valuable and exhaustive work in this treatise. Covering a broader field than any previous publication upon the subject, and with its material systematically and judiciously arranged, it furnishes the practitioner with an admirably complete and accurate statement of the rules of practice and the principles governing the Law of Attachment and Garnishment. The subject is one which enters into the practice of every lawyer, and this treatise should find a place in every office library.

A Treatise on the Law of Negligence. By Horace Smith, B.A. Second American from second English edition. Re-edited and enlarged with the citation of all the American Cases brought down to date. By James Avery Webb. The F. H. Thomas Law-Book Co., St. Louis, 1896. Law sheep. $6.00.

Mr. Smith's treatise has always been recognized as a clear, concise, and at the same time comprehensive exposition of the Law of Negligence. Mr. Webb's addition and notes evidence careful research and discrimination, and the work in its present form is admirably adapted to the needs of American lawyers.

MISCELLANEOUS.

An Examination of the Nature of the State. A Study in Political Philosophy. By Westel Woodbury Willoughby, Ph.D. Macmillan & Co., New York, 1896. Cloth. $3.00.

The student of political science will find much of interest and value in this work. The author's aim has been the construction of a true system of political philosophy, and the determination of the ultimate nature of the state, and the grounds upon which its authority may be justified. While popular government is, in Mr. Willoughby's opinion, the best type thus far disclosed, he is not blind to its defects. "Democracy," he says, "is by no means a simple government, nor one easily administered, but rather the reverse: it is one which presupposes a high morality, an advanced state of education, a great degree of self-control, a considerable amount of material and social equality, and above all, the active and disinterested participation of the wisest and best of its citizens in its political life." Judged by this standard we have much room for improvement. We hope this book will be widely read and seriously considered.

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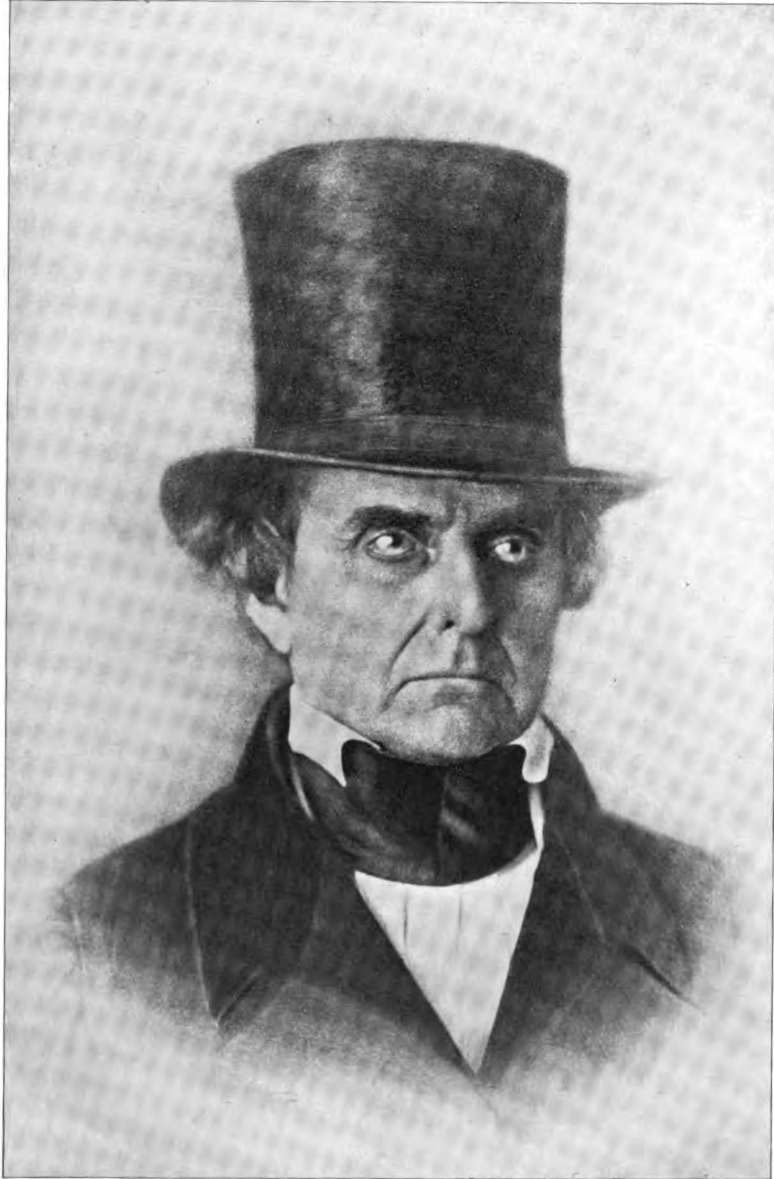

Dan'l Webster

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The Green Bag.

Vol. VIII. No. 6. BOSTON. June, 1896.

DANIEL WEBSTER.

By William C. Todd.

THE presentation of a statue of Daniel Webster to the Capitol at Washington by New Hampshire, his native State, has called attention anew to the life and abilities of this gifted man, especially among those old enough to remember the time when he was so prominent in public affairs, and when Clay, Webster and Calhoun were the intellectual giants of the American Congress. All his intimate friends have passed away; the venerable Robert C. Winthrop was the last; and but few, comparatively speaking, survive who ever listened to him. The writer remembers, when a little boy, hearing a guest at his father's fireside, just after the Knapp trials, say, "Daniel Webster is the smartest man in the United States," and ever after he was interested to learn all about this remarkable man.

The first time I saw Mr. Webster was at the great Whig convention on Bunker Hill, Sept. 10, 1840, which I attended largely to see him. And it was the most fitting of all places to look on him, for it had been associated with one of his grandest oratorical efforts. There he had stood at the laying of the corner-stone of the Bunker Hill Monument, with Lafayette by his side, and before him the "venerable men," "remnant of many a well-fought field," whom he so feelingly addressed. There, too, he delivered the oration at the completion of the Monument in 1843, and it is not easy now to look at the Monument and not think of Daniel Webster.

There had never before, probably, in our country been so large a convention, for the recent introduction of railroads had then first made such a gathering possible, nor has one since been more enthusiastic. The country had not recovered from the panic of 1837, and the hard times were charged, as usual, to the party in power. Log cabins and other things associated with Gen. Harrison were in procession; songs were sung with all sorts of changes on "Tippecanoe and Tyler too," "Van, little Van, Van is a used-up man"; and there were no bounds to the excitement of the crowd. The knowledge, too, that Mr. Webster was to preside on such an historic spot drew many who had never seen him, some of whom had come from all parts of New England in the strangest of vehicles, and took part in the long procession through the streets of Boston to Bunker Hill. Mr. Winthrop called the convention to order, and introduced Mr. Webster as the president of the day. He looked older and larger than I had imagined, and his hair, which he brushed back from his massive forehead, was becoming thin. He spoke briefly, and then with appropriate words introduced the different speakers, distinguished men from all parts of the country, to whom the place, the excitement of that remarkable campaign, and the immense crowd gave enthusiasm. In the evening he presided over a meeting in Faneuil Hall, which was crowded to its utmost capacity. The platform was then but little raised above

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the body of the hall, and I pushed my way towards it, up close to Mr. Webster, and was so near that I put my hand on his back, proud that I had touched him. I heard him say to some one, "Mr. Mason, I wish I had a seat for you," and, turning, I saw a man towering above every one else, and I knew it was that giant in body and mind, one of the greatest lawyers New England has ever produced, Jeremiah Mason. He stood upon a little elevation at last, and, with his deep-

DANIEL WEBSTER'S BIRTHPLACE, FRANKLIN, N. H.

toned, powerful voice, called the crowd to order. His first words were, alluding both to the financial distress and the struggling crowd in the Hall, "My friends, our opponents make a mistake, as you can all witness, when they say there is no pressure in the country that an honest man need feel." He spoke with much emphasis and gesture, dwelling on the strong reasons for a change in the administration, and then introduced the speakers of the evening. I remember best Ogden Hoffman, the eloquent New York lawyer, then at the height of his fame from his success in a recent noted criminal trial, "Broad Seal" Gov. Pennington of New Jersey, George Evans of Maine, Benjamin Watkins Leigh of Virginia, Gov. Kent, for whom "Maine went hell-bent," and Reverdy Johnson.

I saw Mr. Webster next at a Dartmouth College Commencement, when Levi Woodbury, who would have been President instead of Franklin Pierce had he lived, gave an oration, and Rufus Choate was present, the three *alumni* of whom the college is so proud. He was dressed in the well-known blue coat with bright buttons, and wore a white beaver. He declined to make an address. Mr. Choate was also requested to make a political speech, but with a sense of propriety that all public men do not have, he replied that partisan politics should never disturb the harmony of a gathering of scholars.

Such was my interest in Mr. Webster, that if I met any one who had known him, I was anxious to make the most particular inquiries. Professor Shurtleff, of Dartmouth College, remembered him well in his college

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days as thin, dark and pale, so different from his manhood appearance. He slept in the same room with him the first night young Webster spent in Hanover. He denied emphatically the oft-repeated stories that Webster was an idle student and tore up his diploma. He was not the first scholar in his class, but it is certain that he gave promise of his future eminence.

Remarkable as were his powers, his industry and application developed them to the utmost. He could concentrate all his faculties on a given subject, and he would never undertake difficult work when he was tired. He was an early riser, and labored early in the day, when mind and body were fresh. He stated once that, while Secretary of State, he rose every morning and shaved himself by candle-light.

His competition with Jeremiah Mason, at the Rockingham County Bar, sharpened him as nothing else could have done. He had great admiration for this lawyer, and the story is well-known that when he learned that the celebrated William Wirt was to be his antagonist in a case in Boston, he remarked, "I was afraid it would be Jeremiah Mason."

When he began practice, Parker Noyes was the most learned lawyer at the Merrimac County Bar, and knowing but little law himself, yet having an opinion of what the law ought to be, he would go to Mr. Noyes and state his point, and ask where the cases could be found sustaining it.

The late Judge Tenney, of Maine, told me that Mr. Webster, when at Portsmouth, heard one of Mr. Mason's students say that the "old man" had been much puzzled over a particular law difficulty, but had settled it. Mr. Webster inquired what it was, and what was Mr. Mason's solution, and did not forget it. A few years after, in New York, Aaron Burr, one of the ablest lawyers of his time, applied to Mr. Webster for his opinion on this very question, and was surprised to hear his ready answer, that of Mr. Mason.

DANIEL WEBSTER AT 22.

(From a miniature on ivory.)

His retentive memory, termed by Mr. Choate "one of his most extraordinary faculties," never lost information once gained. He was ever thinking, studying, preparing for questions that might arise. He had no time to make special preparation for the Hayne speech, the most celebrated ever delivered in Congress, but he was prepared. It is said that some of the sentences that have become so noted had been elaborated in his mind for years before the occasion arose to use them, like the one so often quoted on the power of England, "whose morning drum-beat, following the sun and keeping company with the hours, circles the earth with one continuous and unbroken strain of the martial airs of England." It does not seem possible that he could have uttered that passage on the power of conscience from his speech at the Knapp trial without previous preparation.

Towards the close of his life especially, Mr. Webster was often dull and heavy, disappointing expectation. It was only when aroused that he was eloquent, while Choate

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could never be dull. One who often heard him, told me he only once saw him animated, and that was when the judge, to his surprise, had decided a point against him. It aroused him, and, warming up, he contended that, admitting the decision of the court to be correct, it was so much better for his client, and he put the case so strongly that there was no reply.

An ex-United States senator gave me an account of a visit of Mr. Webster to Richmond. It had been arranged that he should make an address in the evening from the hotel. The distinguished men of Virginia were around him at the dinner table; the conversation was sparkling; all that Virginia hospitality could afford was abundantly supplied; and the condition of the company became at length what can well be imagined. The friends of Mr. Webster began to fear that he was not sufficiently composed for the effort, and proposed to defer the address. Several leading men were sent to consult him in regard to it, but he adhered to his purpose to speak. Mr. John M. Botts, a noted politician of the day, and a special friend, was sent at last to influence him, but his reply was, "Mr. Botts, I shall speak to-night." At the appointed time, he was aided to the balcony, and placed before the audience. He gazed around for a moment, and in his deep, strong voice, such as they had never heard before, extending far beyond the most distant auditor, began, "Virginians." A great cheer broke out from the crowd. Again he cried, "Virginians," and again a cheer. He was aroused then and himself, and made such a speech as only Daniel Webster could have made.

Mr. Webster was dignified and courteous in debate to his opponents, and rarely drawn into personal remarks. Almost the only instance recalled was in his reply to the attack of Charles J. Ingersoll, in 1846, who had accused him of corruption in connection with the "secret service" fund, and made other charges affecting his integrity. Mr. Webster closed his reply by a sentence whose severity has been rarely equaled: "I now leave the gentleman — I leave him with the worst company I know on the face of the earth, — I leave him with himself."

COURT HOUSE IN WHICH WEBSTER TRIED HIS FIRST CASE.

Hon. Horatio G. Parker, of the Boston Bar, repeated to me recently an interesting statement regarding this Ingersoll charge which he had from the lips of Peter Harvey, whose authority was Jefferson Davis himself.

Mr. Davis had but just entered Congress, and was much surprised when the Speaker appointed him on the committee to investi-

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gate the charges made by Mr. Ingersoll against Mr. Webster. Soon after the venerable John Quincy Adams came to his desk and addressed him thus: "Young man, you have received an appointment on a very important committee to consider a very grave charge. I am older than you are, and, perhaps, have given such a subject more thought. The greatness of every nation is mainly due to the sagacity of a few great men who have guided its policy at critical periods. It was so with the nations of antiquity, it has been especially the case with England—and so it has been, and will continue to be, with our own country. The great men of a nation are its chief treasure. You have had placed in your hands the fair fame of one of the greatest men America has produced, and be careful you do not needlessly tarnish it."

Mr. Davis sent a letter to Mr. Webster, asking when he could meet the committee, and a reply was made at once, when the committee wished. At the appointed time, he produced vouchers for every expenditure but one, and requested delay to find this. In a short time it was found, having been mislaid by his secretary in an old desk in the department. Every matter Mr. Ingersoll desired was investigated, and every accusation shown to be groundless.

Mr. Davis met Mr. Ingersoll soon after, and said to him: "We have examined fully all your charges, and Mr. Webster has authenticated, and satisfactorily accounted for every expenditure in question. Now, Mr. Ingersoll, I think you should state in the House that you have been mistaken, and make ample apology for what you have said and done." His reply was, "I do not know about that—I do not think I shall." "Then," said Mr. Davis, "I addressed him thus: 'I wish no more to do with you, sir; and if you ever speak to me again I will shoot you.'"

All the artists to whom Mr. Webster sat have passed away, the last and most famous, Mr. Healy, only a few weeks ago, who painted the large canvas in Faneuil Hall. Among others to whom he gave sittings was the late Thomas B. Lawson of Lowell, in connection with which the artist told me a singular circumstance. It was at the time of the explosion on the Princeton, Feb. 28, 1844, when so many distinguished men were present and killed, among them two members of the cabinet. For some reason, Mr. Webster did not wish to go on the excursion, and, as he had made an engagement with Mr. Lawson, he requested the artist to insist on its fulfilment, which was done. The day after the fatal explosion, Mr. Webster came to the artist and said, with much feeling, "Mr. Lawson, you have saved my life." He expressed to the artist much satisfaction with the portrait, and as he looked at it said, "That is the face I shave every morning." I have seen it stated that he made the same remark to Mr. Healy. The original, or a copy by the artist, was in the

DANIEL WEBSTER AT 35.

(From the painting by Chester Harding.)

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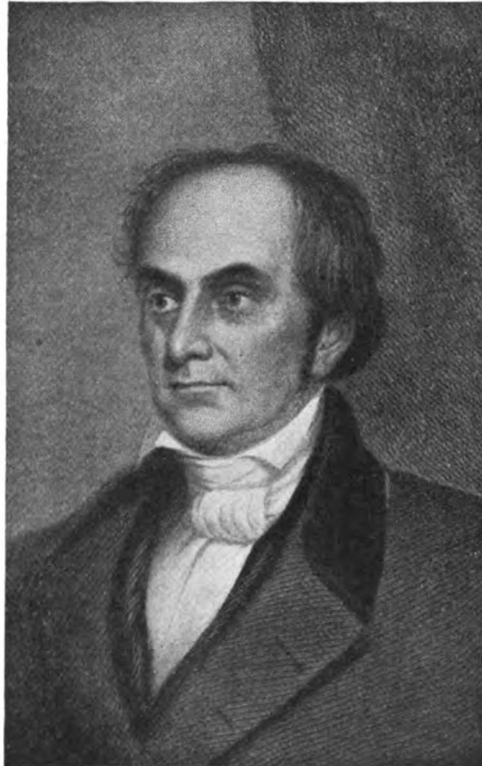
family of the late Wm. B. Todd of Washington, D. C., and is now owned by his daughter, Mrs. John Jay Knox of New York City.

Thomas H. Benton, who was on board the Princeton at the time of the explosion, gave me an account of it, and, with his well-known vanity, said his own life was saved by his thirst for information. He had requested one of the officers to explain some of the machinery, which took him away from the neighborhood of the gun.

As is well known, Mr. Webster remained for some time in the cabinet of John Tyler, after the latter had lost the support of the Whigs by his veto of the bank bill, and by so doing displeased many of his friends. General Fessenden, the father of William Pitt Fessenden, and the life-long friend of Mr. Webster, informed me at the time that Mr. Webster said, if it had been a matter of reason, he could have argued with Mr. Tyler, but when the President had stated that it was a question of conscience, as he believed the bill unconstitutional, he could say no more.



DANIEL WEBSTER AT 55.

(From a painting by Lawson.)

An old lawyer has told me how kind Mr. Webster was to him as a student in his office and a young practitioner. He went to Washington to argue a case before the Supreme Court, and in the most delicate manner, Mr. Webster counselled him to avoid all attempt at display, or to excite feeling, so common before a jury, but to state his case and his law as simply and clearly as possible, which was all that would be effective before hard lawyers like the judges of the Supreme Court.

Mr. Webster's most common competitor at the Massachusetts bar was Rufus Choate, one of the finest scholars ever sent out from Dartmouth College, and one of the most eloquent advocates America has produced. An anecdote is told of them illustrating Choate's scholarship and Webster's persistency. Webster had used a quotation from the classics, and Choate passed him a slip correcting it. Webster wrote on it "a false correction" and returned it. Choate sent out for the author, and passed it to Webster, showing his accuracy. Webster wrote back, "spurious edition."

After one of Mr. Choate's most brilliant arguments, in which, as was his custom, with logic and close reasoning he had mingled many flowers of rhetoric and flights of the imagination, Mr. Webster rose to reply, and in his grave tones, with a wave of the hand, as if brushing it aside, he began, "Poetry, all poetry, gentlemen of the jury; now let us come down to facts."

All are interested in the genealogy of distinguished men, from the belief that

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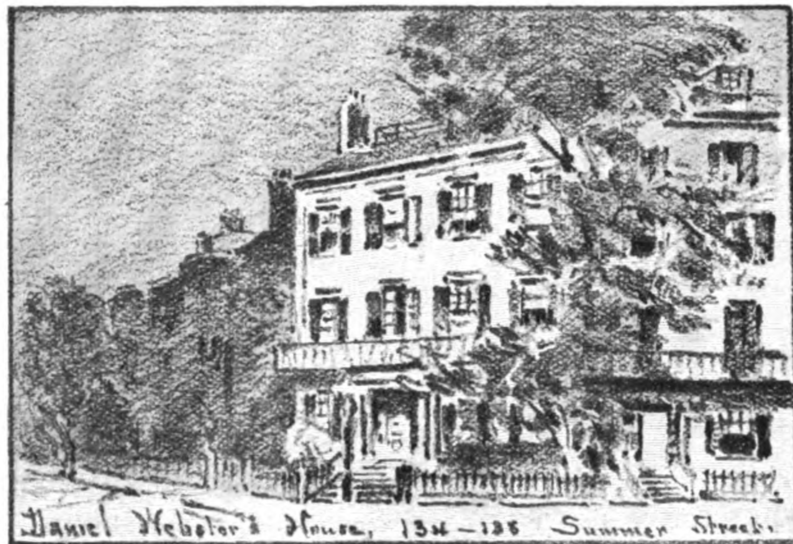
mental as well as physical traits are inherited, it may be, from generations far back. It does not appear that Mr. Webster had much interest in the subject, though he employed Joshua Coffin, the historian of Newbury, to trace back his ancestry. He was so poorly informed that Mr. Coffin told me he gave him the name of his grandfather incorrectly. Different accounts have been given of the Webster ancestry. By request of Gen. Cushing, Horatio G. Somerby, the well-known antiquarian, looked it up in England, and found that Thomas Webster was one of a colony that came from Ormsby, a village near Yarmouth, in the county of Norfolk, and settled in Hampton. The history of Gilmanton states that the first American ancestor of Mr. Webster was John Webster, who came from Ipswich, England, settled in Ipswich, Mass., and was made freeman in 1635. His children were John, Thomas, Stephen, Nathan, Israel and four daughters. He died in 1647. Thomas, born in 1632, lived in Hampton, where he married in 1656, and died in 1715, aged 83. His children were Ebenezer, Thomas, Nathaniel and some others. Ebenezer, son of Thomas, was a grantee of Kingston, in 1692, and settled there in 1700, where Ebenezer his son was born. Ebenezer, son of the last named Ebenezer, was born in 1739, and was the father of Ezekiel and Daniel. He enlisted in the French War as a private, rose to be a captain, returned home and was married.



WEBSTER'S HOUSE IN BOSTON.

A large tract of unimproved land had been given by the Masonian proprietors to Ebenezer Stevens, Oct. 25, 1749. Young Webster went there with a colony to settle in 1763, to whom was assigned the most northern portion. Originally called Bakerstown, then Stevenstown, it was incorporated as Salisbury in 1768. He built a log cabin which he occupied for seven years.

Mr. Webster thus spoke of his father's early condition, which cannot be too often quoted: "A man who is not ashamed of himself, need not be ashamed of his early condition. It

did not happen to me to be born in a log cabin, but my older brothers and sisters were born in a log cabin, raised among the snow-drifts of New Hampshire, at a period so early that when the smoke rose from its rude chimney and curled over the frozen hills, there was no similar evidence of a white man's habitation between it and the settlements on the rivers of Canada."

WEBSTER'S HOUSE AT MARSHFIELD.

(Destroyed by fire, 1878.)

All his life he remained poor, and, as is well known, was obliged to mortgage his farm to educate his children. Yet he was always honored, respected, and useful, occupying such positions as state representative and senator, member of the Constitutional Convention, and judge of the Court of Common Pleas. He was a Christian, too, and active in the affairs of his church. He was with Stark at Bennington, and served during the whole of the Revolutionary War, first as captain, and promoted to be colonel in 1784. He was in the army when news came of the birth of Daniel. Calling to his nephew, he said, "Here, Stephen, I have another boy at home; get a gallon of rum, and we will be merry." This, of course, was long before temperance days, when even good Christians thought it no harm to use stimulants. The son has alluded to his father's fine personal appearance. He was tall, dark, stout, with keen black eyes and a powerful voice, all characteristics of his son Daniel.

The first wife of Ebenezer Webster died in March, 1774, and soon after he went to his old home on a visit. A lady friend said to him, "Why do you not get married again?" "I would," he replied, "if I knew the right one." "I can tell you," she said, "one who will just suit you; about as black as you are, Abigail Eastman of Salisbury." She gave him a letter of introduction, and he mounted his horse for Salisbury. Reach-

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ing the house, a young woman answered his call, of whom he asked for Abigail Eastman. She replied that that was her name, when he handed her his letter, was invited to enter, and before he left the house the business was satisfactorily concluded. They were married Oct. 13, 1774.

She was a tailoress by trade, going from house to house as her services were needed. Her father was the owner of a small farm a short distance from Newburyport on the opposite side of the river. The family came from Wales, and settled first in Salisbury, Mass. She had two brothers, Ezekiel and Daniel, for whom she named her boys.

Both of Mr. Webster's parents were of humble origin, inured to toil. Yet they gave birth to a son by whom they have been more honored than if they could have traced their blood through a thousand titled and senseless ancestors. The father died in 1806, too early to know of his son's fame, though he heard his first effort at the bar. His mother survived till 1816, and lived long enough to be proud of her son.

Mr. Webster died Sunday morning, as the day was breaking, Oct. 24, 1852, and old people well remember the sadness that passed over the land with the tidings, to most unexpected. The papers for days were full of his life, his intellect, and his services. One paper said, "His greatness and fame have become such a part of our country, we did not think we could ever lose him." To quote from Mr. Choate, "His plain neighbors loved him, and one said as he was laid in the grave, 'How lonesome the world seems!'" Eulogies were delivered all over the country, and party feeling was hushed in the wish to honor his memory. His failings — for he had them — were for the time forgotten.

The most remarkable eulogy was that of Rufus Choate, whose heart was so full of love for his great personal friend, before the *Alumni* of Dartmouth College, the common *Alma Mater*. It was a fine specimen of the style of this gifted orator. One sentence fills over four pages of the printed copy. He traced Mr. Webster's career, and dwelt, specially, on the rare spectacle of great eminence at the bar and in public life. "When he died he was the first of American lawyers, the first of American statesmen." He spoke of the charm of his social intercourse, and no one could testify better than one whose relations with him had been so close as Mr. Choate's. "From these conversations of friendship no man — no man, old or young — went away to remember one word of profanity, one allusion of indelicacy, one impure thought, one unbelieving suggestion, one doubt cast on the reality of virtue, of patriotism, of enthusiasm, of the progress of man — one doubt cast on righteousness, or temperance, or judgment to come." To this moral tribute from one who knew him so intimately, it may be added that when a young man he united with the Congregational Church at Salisbury, and never severed his connection. He inherited respect for religion.

DANIEL WEBSTER.

(From a daguerreotype by Brady).

Prof. Roswell D. Hitchcock, the eminent

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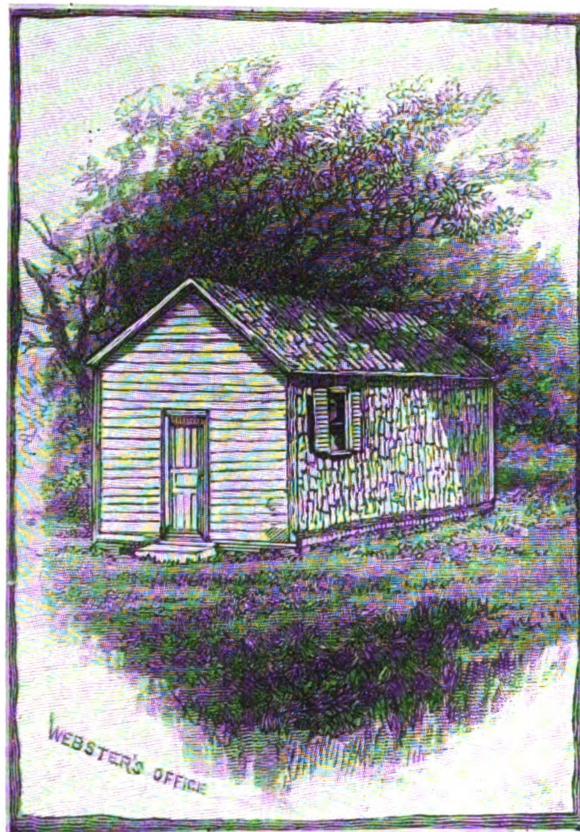
scholar and divine, in a eulogy before the students of Bowdoin College, said, "Daniel Webster before he died had been crowned as the ablest man this Continent has ever produced. . ." "He seemed to belong to another race and order of beings. His brain exceeded in size the common average by at least one-third. Only two such heads had ever been noticed in the world before. The glance of his eye was marvelous, searching as light itself; and when strong feeling roused him, it was terrible. Those who came the closest to him were the most delighted and amazed. The impression always made was that of vast power never yet called out."

By invitation of Peter Harvey, there was a memorable festival at Boston, January 18, 1859, to celebrate the seventy-seventh anniversary of Mr. Webster's birthday. All who participated by speech or by letter had been closely connected with him, and spoke from personal knowledge.



WEBSTER'S OFFICE AT MARSHFIELD.

Gen. Caleb Cushing was called to preside. In his opening address he alluded to the intimacy existing between them in public and private life, and spoke of "his respect, admiration and attachment for Webster, beginning at an early date, and acquiring new strength with every day of a constant and most confidential intimacy." . . . "Cherishing and honoring the name of Webster, we cherish and honor the Constitution he defended, the Liberty he maintained, and the Union he upheld, as one and inseparable, now and forever. We but tread the path of his own great foot-prints, indelibly stamped on the face of the rock of ages, like those of the pre-Adamite collossus-birds on the banks of the Connecticut, so long as we follow the flag, and keep step to the music of the Union." His speech abounded in classical allusions, of which his mind was so full, comparing Mr. Webster with the great men of antiquity. Rufus Choate spoke with his usual marvelous eloquence, so soon to be hushed, for his health had begun to fail, and he died the same year. There was a sad tone to his remarks, for there were forebodings of the terrible strife so soon to deluge the land with fraternal blood, from the sorrow of which, however, he was spared. He dwelt on the reserved power in Mr. Webster and his love of the Union:—

"Although I have seen him act, and have heard him speak and give counsel in very sharp and difficult cases, I always felt that if more had been needed, more could have

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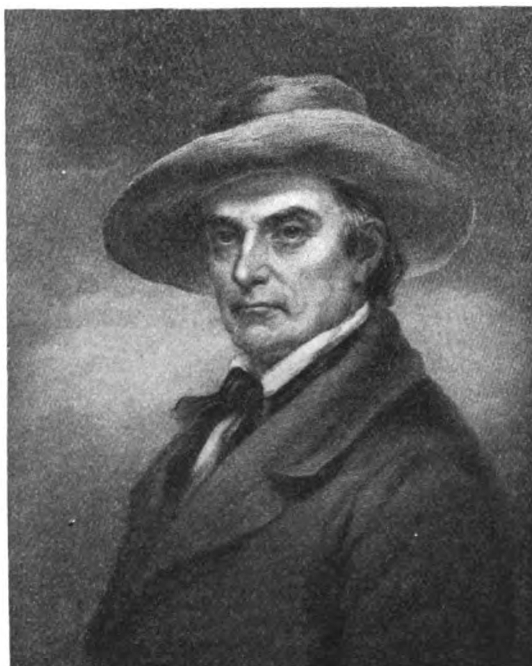
been done; and that half his strength, or all his strength, he put not forth. I never saw him make what is called an effort without feeling that, let the occasion be what it would, he would have swelled out to its limits. There was always a reservoir of power of which you never sounded its depths, certainly never saw the bottom; and I cannot imagine any great historical and civil occasion to which he would not have brought, and to which he would not be acknowledged to have brought, adequate ability. . . The Union, the Constitution — the national federal life — the American name — E Pluribus Unum — these filled his heart — these dwelt in his habitual speech. . . . Oh! for an hour of Webster now! Oh! for one more roll of his thunder inimitable! One more peal of that clarion! One more grave and bold counsel of moderation! One more throb of American feeling! One more farewell address! And then might he ascend unhindered to the bosom of his father and his God."



DANIEL WEBSTER.

(From a painting by Ames.)

Reverdy Johnson, one of the ablest lawyers of his time, in a letter, expressed himself thus warmly: —

"From the adoption of the Constitution to the present time, with all the reverence and admiration we so justly entertain for the many great and patriotic men, living and dead, who have illustrated and enforced its true doctrines, it is no disparagement to them, individually or collectively, to say that on the 26th of January, 1830, and the 16th of February, 1833, they received a support from his lips never before furnished, and one that scattered to the winds the sophistry, suggested by an erring sense of State patriotism, that threatened to weaken, and eventually to undermine them. His reply to Col. Hayne at the first date, and to Mr. Calhoun at the second, eclipsing in eloquence all that the Old or the New World had before exhibited, were so clearly reasoned, so logically powerful, so patriotically perfect, so captivating and persuasive of the heart and the intellect, that the whole nation, as by one irresistible impulse, assented and applauded, and with united voice proclaimed throughout the entire land that proudest of all earthly titles to an American citizen to be his, which the galleries, at the close of the last effort, unable to restrain themselves, and unrebuked, by one spontaneous and deafening cheer, awarded him, 'Daniel Webster, the Defender of the Constitution.'

"But beside my admiration of those almost more than human efforts, and my appreciation of their inestimable value to us as a people, and my knowledge, from an intimacy with which for years he honored me, of his ever perfect patriotism — his constant devotion, to the last moment of his public service, to what he believed to be the true honor and welfare of his country, I remem-

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ber with delight (who, that knew him well, can ever forget?) the charms of his society, when relieved for the moment from the severe duties of life, surrounded by a few friends, he poured out the riches of his mind, the playfulness of his fancy, the charms of his wit, his anecdotes ever so apposite — the goodness of his heart. Look at his firm figure, his stern, mighty brow, promising nothing but intellect, his evidently concentrated thought — could the tenderness and susceptibility of infancy be there also? Yes, it was. I have seen him, when he supposed himself unseen, weep as if his heart would break at the death of a senatorial colleague. His friend had been ill for weeks, but on that morning was thought to be convalescent, when in the evening death was his fate.

MRS. DANIEL WEBSTER (GRACE FLETCHER).
(From the painting by Chester Harding.)

"The suddenness and unexpectedness of the tidings unnerved Mr. Webster, and his nature showed itself as it was, kind, affectionate, loving. Tears, the evidence of it, coursed down his manly checks without an effort on his part to check them.

"He is lost to us, and to his country, but his works remain. His speeches are left. What a rich, invaluable legacy to the cause of letters, of eloquence, and of freedom! They show how mighty a man he was. They will live as long as the English language survives, intellect is honored, free institutions valued, and transmit him to after-ages as one of the great of the world, born to influence the destiny of man by inculcating principles of constitutional freedom, calculated to secure to him the liberty he has a right to enjoy, and the submission to authority, without which it cannot exist."

Professor Felton, in his speech, spoke of a breakfast with the eminent poet, Samuel Rogers: —

"Mr. Rogers sat at the head of the table, surrounded by the most illustrious lights of English science and literature. There he sat, over ninety years of age, pale as a corpse, and almost as silent, while the conversation upon topics of letters and science was passing around him. But when the name of Webster was mentioned, he started up; a new life seemed to course through his veins; the color came to his cheek. He rose, and taking his knife in his hand, and ringing it down on the table, said, 'Mr. Webster was a friend and correspondent of mine. He was the greatest man of his age."

As early as 1820, when the great ability of Mr. Webster had only begun to be recognized, John Adams had said of his Plymouth oration: —

"Mr. Burke is no longer entitled to the praise, the most consummate orator of modern times. . . . This oration will be read five hundred years hence with as much rapture as it was heard."

No stronger evidence could be given than that contained in these extracts from men

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of national reputation, his intimate associates in public life, how deeply Mr. Webster's ability impressed his own generation, nor is it believed from the tone of the speeches at the reception of the statue, that the intervening years have materially modified that judgment.

Of Mr. Webster's two sons who reached maturity, Edward was graduated from Dartmouth in 1841, though he had studied mostly in Europe under the care of Mr. Everett. He died in 1848, in the Mexican war, and Fletcher in the war of the Rebellion. All his descendants have passed away. The mother of his children was Grace Fletcher, of Hopkinton, N.H., whom he married in 1808. An old lady, her schoolmate at Atkinson Academy, has told me she was a pale, modest, sweet girl, whom all loved. During a recent visit to Hopkinton, the house where she was born was pointed out, and I saw also the grave of her father, Rev. Elijah Fletcher, who died in 1786, at the age of 39.

Most of the leading men of that period have been forgotten by the masses, but much as Webster impressed his contemporaries, the more than forty years since his decease have not lessened his fame. At the World's Fair, the thing that most attracted attention in the New Hampshire exhibit was a huge plow, said to have been made and used by him. He was a great lawyer, a great statesman, a great writer, a great orator. He had the faculty of grasping the heart of a question, and presenting it with irresistible power, in plain Saxon language, so that even the uneducated could understand. The speeches of many of our American statesmen have been collected, but none have continued to be read as those of Mr. Webster; none are so often quoted; from none have come down to us so many sentences that have become as household words. He early studied to acquire a clear, condensed style, and was particular in his choice of words. He could not have made such speeches as have distinguished the recent silver and tariff debates in Congress,— mountains of words, all striving to ride on the back of a few poor ideas.

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THE LAW'S DELAYS IN THE OLDEN TIME.

A REMARKABLY interesting and contemporaneous picture of the delays and difficulties of the reign of Henry II is to be found in a well-authenticated MS. memorandum made by one Richard de Anesti, setting out in simple language his struggles to obtain a judgment as to his right to certain lands in the county of Hertford.

His uncle, William de Sackville, being precontracted to one Albreda de Tregoz, afterward married Adeliza de Vere. The latter contract being declared invalid on appeal by the Bishop of Winchester, he returned to Albreda and lived with her until his death. Leaving no issue by Albreda, and dying intestate, Richard as heir at law of his uncle claimed the land which was also claimed by Adeliza on behalf of a child, of whom she alleged that William de Sackville was the father.

Richard relied for his case on the divorce granted nearly thirty years before and acted on by all parties, the validity of which, however, was disputed by Adeliza.

He began by sending to the King in Normandy for a writ, which being obtained, he took it to Queen Elinor at Salisbury to be sealed by her, as she held the Great Seal during the King's absence. He then had a day appointed for his cause to be heard by Richard de Luci, then Chief Justiciar at Northampton, and he duly cited Adeliza de Vere and her brother Geoffrey. Arrived at Northampton with his friends and witnesses, his cause was postponed by de Luci to Southampton. The matter was then moved into the court of Archbishop Theobald, who ordered it to be heard at Lambeth, on the feast of St. Vincent, from which date it was postponed to the feast of St. Perpetua, and thence to the feast of St. Valentine at Maidstone.

After other adjournments, he appeared with his friends, his advocates, and his witnesses before the Archbishop at Lambeth, when he was again referred to Canterbury, and thence to the King, who was in Gascony, where he went with his friends and helpers and found the King at Auvilar. He then returned to Canterbury and followed his suit in journeys between London, Canterbury, Winchester, Chichester, Salisbury, and Normandy. His case then got before the Bishop of Chichester and the Abbot of Westminster, who gave him days in London and at Oxford, but his case was not heard.

Delays and postponements followed each other, and then his adversaries appealed to Rome, where his claim to succeed his uncle was confirmed. At length his influence at court induced the King to accept a fine of 100 marks of silver to hear the case before himself and his chief justiciar, de Luci. After protracted delays, during which he followed the King for weeks at Romsay, at Reading, at Wallingford, and elsewhere, being unable to get a hearing through the multiplicity and importance of the business to be transacted, the King in person tried the case at Woodstock, and confirmed de Anesti in his title to the land.

In this suit, which he tells us lasted *six years*, he spent all his substance in journeys, in payments to his friends, to his advocates, and to his witnesses, and in fees and gifts to the Queen, to the King's physician and to others, detailed particulars of which he gives in his story. And he adds that, having been three years in possession of his uncle's land, he still saves fifteen marks to the King, and most of the money which he had borrowed from Hakelot the Jew during the progress of his case. — F. A. INDERWICK, *in "The King's Peace."*

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SOME PECULIAR JUDGMENTS.

By George H. Westley.

IT is a blessing to us writers that there are two great repositories of wisdom and human experience, viz., the Bible and Shakespeare, from which we may draw helpful ideas and illustrations for almost any article we may set our pens to. I am led to say this here because, in puzzling over an introduction to my budget of notes on peculiar judgments, there has come most welcomely to my mind the familiar story of Solomon and the two mothers, and also that of Portia and the very clever manner in which she saved Antonio his pound of flesh. Shades of Solomon and Shakespeare, I thank ye!

A very interesting judicial feat was that of the Emperor Claud. There had come before him a young man who complained that his mother had disowned him, saying that he was no son of hers, and in no way entitled to any share of the family property. The emperor became greatly interested in the case and made careful investigations, with the result that while he could find no conclusive proof that the young man was the defendant's son, yet many things indicated that relationship. Having arrived at a decision, the emperor ordered the woman to be brought before him, and said to her: "Do you still deny that this man is your son?" "I do," she replied. "Well then," said the emperor, "if he is not your son, he shall be your husband. I order that you be immediately married to him." This unexpected judgment proved effective, and confessing her perjury the woman acknowledged that the young man was what he claimed to be.

The Duke of Ossone, while viceroy of Naples, delivered many quaint and clever judgments. The case is related where a young Spanish exquisite named Bertrand Solus, while lounging around in the busy part of the city, was run against by a porter carrying a bundle of wood on his shoulder. The porter had called out, "Make way, please!" several times, but without effect. He had then tried to get by without collision, but his bundle caught in the young man's velvet dress and tore it. Solus was highly indignant and had the porter arrested. The viceroy, who had privately investigated the matter, told the porter to pretend he was dumb, and at the trial to reply by signs to any question that might be put to him. When the case came on and Solus had made his complaint, the viceroy turned to the porter and asked him what he had to say in reply. The porter only shook his head and made signs with his hands. "What judgment do you want me to give against a dumb man?" asked the viceroy. "Oh, your Excellency," replied Solus, falling into the trap, "the man is an imposter. I assure you he is not dumb. Before he ran into me I distinctly heard him cry out 'Make way.'" "Then," replied the viceroy, "if you heard him ask you to make way for him, why did you not? The fault of the accident was entirely with yourself, and you must pay this poor man compensation for the trouble you have given him in bringing him here."

Leader Scott, in his "Echoes of Old Florence," tells some amusing stories of one of the old podestàs or supreme judges of that city, Messer Rubaconte. On one occasion a poor man named Bagnai was brought before him by a party of angry persons who declared that he had killed one of their family, and demanded justice. When the prisoner's time came to speak, he gave his version of the matter thus: "Noble Messer Podestà, the fault is not mine. I might very easily have been the dead man instead of him. This was the case: I was crossing the Arno on the little wooden bridge when there

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came by a great company of cavaliers on horseback. To avoid being trampled to death, I climbed upon the rail, but a horse pushing against me, I straightway fell over. By ill chance I pitched on the head of a man who was bathing his feet in the river, and broke his neck; so he died, as much to my grief as to that of his relatives."

This story however did not appease the wrath of the complainants. "Give him the utmost pain of the law, Messer Podestà," they cried; "our honor demands it."

Good Messer Rubaconte was puzzled. An accident could not be punished as murder, yet the man was dead, and Bagnai had undoubtedly killed him. He thought a few moments and then said: "Friends, your honor shall be maintained and your injury avenged. What has been done to you, you shall render to him. Let Bagnai go into the Arno to bathe his feet at the same spot, and one of you, the avengers of the dead man, must fall from the bridge on his neck, and so all shall have their due."

The prosecutors' faces fell. They consulted over the decision of the wise Podestà, and then concluded to drop the case.

This same Bagnai, though innocent enough, seemed to have a decided faculty for getting into scrapes, and such peculiar scrapes that Messer Rubaconte's wisdom was more than once severely taxed to get him out of them. One day as Bagnai was walking down the road, his assistance was asked by a peasant whose donkey had fallen down. The man told him to take hold of the beast by the hind-quarters, while he himself would lift the donkey's head, and so lifting together they would get it on its legs. Bagnai, willing to oblige, seized the donkey's tail, and pulled so hard that he pulled it off.

For this Bagnai was brought up before the Podestà. "I did not tell him to pull the tail off," said the complainant. To which Bagnai replied naively: "I thought a donkey's tail would have been better stuck on." Messer Rubaconte laughed heartily at this, and advised the litigants to depart in peace, since, although the tail could not be stuck on again, the donkey was not by its loss incapacitated from carrying a load. "But how will he whisk off the flies?" cried the peasant, determined to find a grievance. Messer Rubaconte, turning the matter over in his mind, at length said: "Bagnai must perform the office which he has deprived the donkey of power to perform. He shall keep the donkey in his stall till his tail has grown again, and then return him to you." The peasant concluded that he would rather have a tailless donkey than no donkey at all, and so the case ended.

On still another occasion Bagnai picked up a purse containing four hundred florins, and being honest and simple, he gave it up to a certain person who claimed it. This man, however, declared that one hundred florins were missing, and poor Bagnai had once again to face the Podestà. "Do you think it likely," asked the judge, "that this honest man has robbed from a purse which he lost no time in returning to its owner?" "No," replied the prosecutor, "but this is not mine, for mine had five hundred florins in it." "Indeed!" said the Podestà; "then my judgment is that Bagnai shall keep this purse till you find one with five hundred florins; you, meanwhile, giving him security that this is not yours." The decision stood, and the prosecutor was sent off about his business.

Scaliger relates an interesting story which may be told in this connection and will afford variety. Macaire, one of the body-guard of Charles V of France, one day enticed his comrade Aubrey de Montdidier into the forest of Bondy, and there murdered him. The murdered man's dog, which had been running about, did not come up until his master's body had been buried by the assassin. The faithful creature threw itself on the new-made grave, and there remained until driven off by hunger. Day after day it would seek food and return, until at length

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attention was attracted to the creature's strange conduct and the body of Montdidier was discovered. It was noticed that whenever the dog saw Macaire it strove to fly at him. This aroused suspicion, and the king, hearing of the matter, resolved to investigate. Macaire and the dog were brought before him. Immediately the creature saw Macaire it again strove furiously to get at him. Macaire protested that he was innocent of the murder, but this did not satisfy the king, who ordered that Macaire and the dog should meet in single combat, the man to be furnished with a stout stick, and his fourfooted opponent to have an open barrel to which it could retreat in case it was hard pressed.

The oddly-matched combatants entered the arena. The dog acted with extreme caution, keeping just out of reach of the staff until it saw its opportunity. Then it gave a furious bound and caught Macaire by the throat and bore him to the ground. The wretched man, fearing that he would be torn to pieces, cried for mercy and confessed his crime, whereupon the attendants rushed in and dragged the dog away. Macaire was handed over to the law, sentenced, and executed.

In these modern times picturesque judgments are hard to be found. I recall one or two little stories however. A man on trial in Illinois for horse-stealing put in a plea of matrimonial insanity. "Matrimonial insanity," exclaimed the judge; "that is a novel defense; however, let us hear the evidence." A witness deposed that during the ten years he had known the prisoner, the latter had married half a dozen times, and was living with wife number six at the time of his arrest. "They were all a sorry lot," he continued, "and they kept the poor man constantly in hot water by their peevish, scolding, quarrelsome dispositions."

After this account of the prisoner's matrimonial tribulations had been confirmed by other witnesses, his lawyer made an eloquent appeal to the court, concluding with the plea that his client could not be held a responsible agent after being galled by such Xantippes for ten years. This skillful "touch of nature" was sufficient for the judge, and he charged the jury thus: "This court has had a certain amount of matrimonial experience with one female, and such experience has not been altogether of a satisfactory character. But here is a man who has been so blind, imbecile and idiotic as to marry in ten years six horrible scolds and shrews. For so doing I class him as a natural fool; and even if he possessed any intelligence, the dwelling with these women must have destroyed it. The plea of the counsel for the defense is sound in law and equity, and I charge you to bring in a verdict of acquittal." The jury did as they were bid.

A tax-collector at Naples absconded with a large sum of money. He was caught, brought back, and put on trial. His counsel admitted the charge, but put in the plea that as the collector was one of the people, and the money was the people's money, it would be monstrous to convict him of stealing what was his own. It is well nigh incredible, but the story runs that on this plea the thief was acquitted.

Some years ago Miss Roxalana Hoonan brought Mr. Earle before the Brooklyn court for breach of promise. She admitted that the gentleman had never promised marriage by his hand or tongue, but he had kissed her in company. Judge Neilson told the jury that no interchange of words was necessary, "the gleam of the eye and the conjunction of the lips being overtures when frequent and protracted," and thus directed they made the defendant pay fifteen thousand dollars for heedlessly indulging in eye-gleams and lip-conjunctions.

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THE LAWYER'S POSITION IN SOCIETY.

By Guy Carleton Lee.

ONE of the greatest moralists of the last century has expressed his conviction that "Nations as well as individuals may possibly become insane," and I think the learned author might well have said: Nations certainly do become insane. The pages of history furnish many familiar proofs of this assumption.

We can follow up the suggestion and find various forms and types of insanity in the nation corresponding in some degree to the madness and delusions of individuals; and I have no doubt that racial psychology might well include a department of mental aberration as manifested in races and nations. Whether the anthropologists and psychologists are willing to extend their sciences already covering very wide fields, we cannot say. It however remains a hypothesis which enables us in a large degree to understand the misconceptions and delusions that from time to time seize upon the popular mind.

There exists at the present time a strong delusion in regard to the professions popularly styled learned, and this delusion is the more extraordinary, occurring as it does in a land which prides itself upon the intelligence of its citizens, and appears to consider popular education and learning as the very bulwark of the nation. According to that by no means inconsiderable class suffering from this mental aberration or species of fixed idea, physicians, theologians and lawyers are entirely on the wrong track. A man, in order to treat disease, needs not to study anatomy or pathology or to spend his time in laborious investigation of the effect of drugs upon the human system. He should content himself with a metaphysical system, a wild farrago of scraps of exploded diatribic philosophies masquerading as a revelation.

Another class, even more numerous, for the metaphysical jargon hurled at the unlucky physician needs a certain amount of reading in order to be acquired, regards the lawyer in a much worse light than a deluded man. To its members he is a species of social vampire which the greed of the dominant class has maintained to help ruin the "horny-handed son of toil"; his learning is but knavery reduced to science; his business, in a large degree, when not the support of the capitalistic offender, is the production of strife, that from it he may draw the enormous revenues he is popularly supposed to enjoy. He is perpetually La Fontaine's monkey dividing the cheese between the two cats.

I do not think I over-rate the opinions that exist in many minds. There are movements in existence which are directly opposed to the legal profession, just as there are movements with the object of defeating the beneficent labors of the medical profession. You all know them, their aims are openly avowed.

I would not pretend that there has been no occasion for complaint in the history of the learned professions. I am even inclined to the opinion that the legal profession has sinned more recently and more conspicuously than any other; not merely because the opposition is greater to lawyers and the whole system for which they stand, but also because men whose selfish interests were bound up with traditional abuses have felt themselves called upon to effect a reform, in order that justice might not be denied the poor man, and I am willing to go even further, and say that a system which allows officers of justice to draw sums as fees that are disproportionately large for the work done, is in need of further reformation; that

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the fee system, as it usually exists, is a curse to the community, masking licensed robbery; that the periodical election of judges is a debasement of the ermine and opens the door to judicial corruption.

But I should be grievously misunderstood if you should interpret me as implying that the profession is wholly, or even in any considerable degree to blame for the contempt in which it has come to be held by the half-educated masses. The inveterate prejudices of ignorance, the appeals of demagogues to people suffering from real or imaginary wrongs, are sufficient to explain to a large degree that extraordinary state of mind which can only be likened to a delusion.

Many people do not recognize the place the lawyer holds in the community. They see in him not one who renders justice possible, but one who makes it difficult and costly; not one whose work is to promote the welfare of the commonwealth, but one who fattens upon the wrongs which he has to a large extent created.

But the lawyer's place in the community is real and necessary. The assertion made by some, that he is the survival of offensive measures, is radically false. His position is necessary to the life of every form of modern civilization, it is the direct result of that enormous development through which society has passed. We may not care to apply to him that awful account which Mr. Herbert Spencer gives of the world's evolutionary process (at hearing which the universe is reported to have shuddered). Still the differentiations in society which produced the heterogeneity of professions brought forth the lawyer.

In primitive ages, the conditions of life were simple and the adjustment of the relations existing between men was an easy matter. With growing complexity in the social structure, and the more subtle distinctions between right and wrong, there arose insensibly a class of men learned in such matters.

When men discovered so much about human physiology and therapeutics that such knowledge could no longer be common property, there arose a profession devoted to that branch of science, and the physician is in the first instance the man learned in the healing art; and so I conceive the lawyer as a man who primarily devoted himself to the exposition of law. He is a man learned in the law. The lawyer is, however, more than a student of laws. The labors of the philosopher investigating the principles upon which the law is based, the notions of personality, liberty, moral responsibility, property, the family and the state, or the research of the ethnologist and anthropologist tracing the primitive customs having the force of laws as they vary among different races and in different ages, are but the foundations upon which the lawyer bases his special work.

A lawyer being in the first instance a man learned in the law of the land, he has duties of vast responsibility and the widest influence; and the public is entitled to, and receives, the most ample protection against an abuse of the great powers of the office, which, by its agents, it has conferred upon the attorney. His moral character is carefully scrutinized, his whole career is watched, for his position as a member of the Bar, his success in his profession, is dependent upon the rectitude of his conduct. Upon admittance to the Bar the lawyer pledges himself to aid in the administration of justice, and he becomes an officer of the court. In all these solemn obligations, there appears no little resemblance to the course which is pursued in a sister profession, one with which for centuries the law was identified. I refer to theology and the preparation through which students in that science must pass before they are permitted to exercise the functions of the sacred ministry. Theological and legal students fit themselves by several years of study; both are tried and examined by those already in authority; both assume solemn obligations, over both a rigid law of moral-

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ity keeps watch, and this has arisen from the same healthy interest in society which prescribes such measures, not only for those who pledge themselves to be faithful dispensers of God's Holy Word, but also for those who pledge themselves no less solemnly to further among men the cause of God's Eternal Justice.

But the lawyer is by no means confined in his work to the prosecution and defense of suits, the giving of counsel and other functions connected with his position in the administration of justice. There is another duty which he is called upon to perform, and for which as a student of law, a specialist we might say, he is peculiarly fitted. It is the enactment of laws, and in this capacity especially he is misunderstood and assailed.

The lawyer, as a law-maker, has been the object of the most violent attack on the part of several large organizations and associations which have at times assumed the proportions and guise of political parties. A very extensive organization devoted to the interest of agriculturists has been especially hostile to the presence of jurists in the councils of the nation. Another, led by demagogues, would in the interest of the lower classes drive every lawyer, not only from the House and Senate chamber, but from the bench.

Support for the position of the anti-legal faction has been sought in the peculiar composition of the British Parliament, in which the proportion of lawyers is much less than with our legislatures. In Great Britain we find a large class of men debarred by the conventionalities of society or relieved by circumstances from the active pursuit of business. Landed proprietors, country gentlemen, younger sons of the nobility are prominent in the debates of Parliament, while lawyers, as we use the term, are by no means conspicuous. It has been argued that our legislative bodies should not include more than a certain proportion of lawyers and that the model which in England is the result of circumstances should become a law in this country, despite our peculiar social structure. But the difference is immense. In the first place we have no class corresponding to the English landed gentry, men frequently of the most liberal culture and born with an interest, we might say, in the legislation of the empire. For their antecedents, their positions as local magistrates, as landlords with more than a personal interest in their estates, these and other grounds lead them naturally, even when ambition and patriotism have but small part in their natures, to work in Parliament and make jurisprudence a part of their education.

With us, the only considerable body able to study law, or to prepare for the work of the legislature, is the legal profession. The customs of the land induce those whose wealth renders it immaterial whether they engage in business or not, to follow some active pursuit, and very few, except demagogues, are led to devote themselves to politics as a profession. Our pernicious system of rotation in office renders a diplomatic or official career impossible. We must draw upon new men, and the only class in which anything like adequate preparation is to be found is the legal profession.

Then again, the parliamentary methods are so different that no support can be found in the legislative assembly of the mother country for the proposed change. In the British Parliament the important bills are prepared by a select body of experts, the cabinet. Details are cared for by these few experts, and the general tenor of the proposed legislation, with its moral and economic effect and its relation to the governmental policy is studied by men in an especially fortunate manner fitted for the work, by wide culture and liberal interest. In this country, however, the whole method of procedure is different. There is no cabinet, in the British sense, to prepare the principal bills. The Congressional commit-

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tees represent it to a slight degree only, and they are so distinct one from another, that they cannot be expected with any degree of certainty to prepare wise and comprehensive schemes of legislation (even accuracy in wording important bills seems sometimes beyond their powers).

Again the committees are not made up of men of the same training as those who compose the British cabinet of experts, but include and are sometimes almost entirely composed of new legislators. Under these conditions it is all the more necessary that every member have the best training possible; and but one class, the legal profession, furnishes even an approximate preparation.

When we consider the circumstances in which we are placed, the man best able to legislate is, in the vast majority of cases, the lawyer, not because he is conversant with all the details of business in its various ramifications, but because he has a larger knowledge of laws as they exist, a keener insight into the fundamental nature of laws, and is better able to devise measures harmonizing with principles established by custom or express enactment. He has had this training in his profession, and no other profession, trade, or calling can furnish the same preparation.

In legislative bodies there will always be advocates of various local measures that are demanded by larger or smaller sections of the country. What are known to-day as the measures of the Silverites, the Protectionist-Manufacturers, the Free Raw Material Manufacturers, the Prohibitionists and the Populists, will always be represented, in one form or another in the legislature.

Measures good and bad will always be advocated. One-sided selfish interests will always be urged. The manufacturer of the North, fearing competition, will demand protection, even at the expense of his brother, the agriculturist of the South. The woolen manufacturer of the East cries for free wool though it means ruin to the wool grower of the West. It is right, it is necessary that such conflicting interests be represented. The legislation for a country of such immense extent and such varied resources and needs must take into consideration all classes and all sections. But above all these clashing interests there must be some controlling and directing principles; some power that will further a harmonious and vigorous development of national life, and that power, that principle can only be found in that body devoted to the study of the fundamental principles of legislation, the lives of whose members are spent in the interpretation of the will and heart of the nation as expressed in its common and statute law, and the fundamental law, the Constitution.

But the lawyer's work does not end in the legislative chamber; he has a still larger field of usefulness, and a still more important position in the whole structure of society. The laws which have been enacted must be applied, after their true meaning has been ascertained. I am quite aware that the demand that the laws be interpreted and their meaning carefully ascertained has been attacked as a piece of unnecessary subtility and a part of that conspiracy in which lawyers are supposed to be engaged to make the administration of justice costly and so out of reach of the poor, and to give the rich opportunities to evade the demands of right.

Let us turn to our sister science theology, and see how it is there. We find almost the same protest made against any profound study of interpretation. The protest is made by almost the same class as that which objects to extensive study of legal principles, and we find among theologians men disputing more violently about proof texts and passages of scripture than ever lawyers wrangled over a point in law. Each man feels that there is no difficulty in the passage, he sees clearly its meaning, — to him it is a perfectly lucid statement. Yet these interpretations are sometimes diametrically opposed.

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In law there is as much need for scientific exegesis as in theology. Laws that have been long enacted need to be studied in their history, often a more difficult task than the interpretation of literature, owing to the compact form and the isolation in which a law stands. The various changes that have taken place in their structure must be ascertained that the true value may be given to each separate word. The circumstances under which laws were put forth must be discovered in order to make the import of the enactment perfectly clear. In short, laws must be studied in relation to their times, that we may not miss the spirit in our endeavors to fulfill the letter. If the saying be true, "Tempora mutantur, et nos mutamur in illis," it is no less true "Tempora mutantur, et lex mutatur in illis" — and who shall interpret the law but those learned in the law?

True as all this is respecting statute law, it is equally true and even more important in regard to common law. In the statutes the lawyer has, in the vast majority of cases, legislation of a comparatively recent period. The eternal vigilance of the profession secures from time to time the necessary revision of the statutes, and important amendments, so that the law may be clear as to its scope and applicable to the present state of society; but in that vast body of law which is the expression of the sense of justice native to the race there is, from its very nature, little opportunity for amendment or revision.

Who is to interpret this law, the Common Law? who is to make those principles that trace their origin to the earliest Aryan village community applicable to the highly complex society in which we find ourselves? Who but those who for five thousand years have been constantly engaged in that one occupation?

To be sure, the law has not existed all this vast extent of time as a distinct profession: the lawyer's work was originally a part of the king's duty, in the same way as the chief of state was the earliest high priest. But with the advancing race came the distinctions of professions, and there has been no breach in the continuity of function.

We can never forget the labors of those who have vindicated for the legal profession its claim to be an integral part of the civilized community. We can never forget such men as Lord Mansfield, who found the Common Law as applied to business in a state more in place in the dark ages than in England in the eighteenth century, and left it a commercial code abreast of the business affairs of a great nation. Within a hundred years the nation had grown from a second-rate to a first-rate power. A century before its king had been a pensioner of France; it was now the conqueror of France; and the commercial revolution was more important than the political.

The law must enlarge *pari passu* with the nation, yet the same principles must remain, for the nation was the same — only grown. The conscience of the race was the same. The law, must, however, meet the new demands made upon it. Was it done by sketching the law? That cannot be truthfully asserted. We know indeed that Lord Kenyon differed on this point diametrically from his great predecessor. Expressing himself in these words, "It is my wish and comfort to stand 'super antiquas vias' — I cannot legislate, but by my industry I can discover what my predecessors have done, and I will tread in their footsteps." We cannot deny the conscientiousness of this statement, but as a precept it is psychologically impossible to follow it.

It was an easy matter for Lord Kenyon to make this statement after Lord Mansfield had practically created commercial law, justifying himself in those memorable words "'Quicquid agant homines' is the business of courts, and as the usages of society alter, the law must adapt itself to the varying situations of mankind."

It is because the lawyer is a man learned

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in the law that he is assigned his place at the bar of justice, that he is chosen to represent his fellow citizens in the legislative assemblies of the nation, that he is called upon to expound and apply the law that is embedded in the national conscience. Such tasks define the ideals of the profession. They make up the idea of the lawyer which is expressed, more or less imperfectly, in every conscientious man following the legal profession.

Because men fail to see the lawyer in his relation to the whole nation, because they have not the liberality of thought and breadth of view which enables men to judge things in their larger significance, but remain able only to estimate other men from their narrow standard of individual experiences and prejudices, because such men are incapable of intelligent judgment, they naturally fail to understand the true importance of the legal profession in the social structure; but so long as there remains a conscience in men, so long as justice remains in society, so long will there be those who shall interpret the mandates of that conscience and administer that justice, so long shall the legal profession remain as an integral part of civilized society.

A LAW-STUDENT'S DREAM, JUST AFTER THE BAR EXAMINATIONS.

By Paul Taylor.

I STEERED my flotsam through the percolating waters without colliding with any mechanic's lien or other encumbrance, and finally disembarked on a strip of alluvion at the foot of a hill. Securing the little vessel to a bottomry bond on the beach by means of a long chain of title, I prepared to climb the proclivity.

The waves were rolling up like liquidated damages. Here and there gleamed the scales of a maritime lien swimming just below the surface, while the offing was dotted with contracts of sale. The coast stretched away on either side as far as the eye could reach, indented by little coves where companies of directors were watering stock, or sweet young femes-sole were wiping clouds from their mothers' titles.

I proceeded up the hill along the easement which skirted it, between two rows of tall genealogical trees. I could just see a manor house at the top, in front of which a regiment of milites were assembled on the demesne lands aiming several municipal ordinances and canons of descent at the great jetsams riding at anchor in the harbor. I was afterwards told that the soldiers were firing objections, exceptions and demurrers, the most dreadful types of projectiles known to modern science. Certain it is that the engines of war were going off with deafening appeals!

Nothing daunted by this war-like scene, I continued to approach. On the genealogical trees the little birds wagged their fees-tail merrily. I never saw so many fees-tail before, and they were increasing all the time, as the skillful Statute de Donis stood near at hand, converting conditional fees into fees-tail as fast as he could. Not far away was a more melancholy sight — the gaunt Statute of Uses executing innocent uses with a sharp deodand.

There were many strange things to be seen on the demesne lands. Signs, stuck all over the grass-plots, exhibited the most threatening mottoes. Here, one read, "Sic utere tuo," there, "Res inter alios acta." A board, nailed to a tree, contained the dreadful legend: "De minimis non curat

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Lex!" In short, the lord of the manor, who was a tenant in capite, had ransacked the reports to find the most barbarous maxims for his signs.

The manor house itself presented rather an agreeable appearance. A number of ancient lights opened in the gable. The power of alienation was suspended from the peak of the roof, while over the door hung a formidable attachment ready to clap down on any enemy of the realm who escaped the summonses and subpœnas at the gate of the close. A series of exquisite torts embellished the lintel. Tracings of intricate special pleading were frescoed on the walls. On either side of the portico stood a granite rebutter surmounted by a vase of feathery testimony. You could not wish to see a more beautiful hereditament. From the chimneys, smoke — prescriptively entitled to be there — curled and curvetted through the air with the graceful indirectness of perjury. The genial host had affixed a jury-box at the side of the stoop for the convenience of the people; and a bunch of pepper-corns, to be used upon entry, hung within easy reach.

When I knocked, the door was opened by a tenant by the courtesy, who instantly did fealty according to the most approved etiquette. In reply, I paid my best homage, and politely made an offer of contract, which was as courteously accepted. I then wiped my feet on the twilled breach in limine which lay at the threshold, and was conducted into the presence of a very cross-examiner who sat on a bench behind a bar dictating briefs. Six masters in chancery were engaged close by in penning beasts feræ naturæ into a dock. Little yellow equities of redemption in golden cages trilled out the most charming melodies above my head. A profit-à-prendre sat at the feet of the cross-examiner foretelling recent decisions. The remainder of the company consisted in the main of common counts, though a goodly sprinkling of femes-covert circulated among them fanning themselves with inchoate rights of dower. A group of noisy infants were seeking to partition a long term of years which they held jointly and per stirpes. At the further end of the hall a trustee on a ladder was tacking mortgages. There were some unpleasant features. For instance, on one of the window-sills I saw a warranty deed, thirty years old, scratching an eruption of covenants which had broken out all over him. A mournful last will and testament was wandering about in search of a deceased subscribing witness, and two feoffment deeds were consoling each other in a corner because both had lost their seals.

Unable to endure so motley a crowd, I adopted an insurance policy and put in a plea in abatement. That gave me a right to enter the dining hall. Imagine a great table — a board of directors — upon which were spread the most savory viands. A huge jointure smoked at one end. At the other some coparceners were serving a splendid hotch-potch. Here and there convivial ancestors were carving up particular estates and remainders. There were heaps of first-fruits and emblements, and in the center of the table steamed a noble pot of riparian rights!

I enfeoffed myself in a comfortable arm-chair, determined to partake of this sumptuous feast even at the cost of a seisin of indigestion. But hardly was I seated before a great hue and cry arose, because a springing use had leaped upon the table and was damage feasant among the dishes.

"Execute it!" yelled somebody.

"You can't," shouted a second voice; "it's only an executory devise after all!"

"Where's its particular estate?" shrieked a third.

In the midst of this hubbub I arose to escape, only to run into the arms of a hideous, decrepit fee-tail-after-possibility-of-issue-extinct!

"You horrible thing!" I cried. "You ought to be barred by the rule against

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perpetuities!" And with that I tore out of the house, not waiting even to settle the bill in equity which was tendered me at the door! The last I heard of this extraordinary manor was a faint shout, as I issued out on the easement, which directed some unseen sheriff to serve a writ of *ne exeat* upon me!

SOME ASPECTS OF THE GROWTH OF JEWISH LAW.

By David Werner Amram.

I.

The Study of the Law.

THE study of the law was for a period of two thousand years the principal intellectual exercise of the Jews. The Talmudic period, so called, was especially characterized by mental alertness and richness of fancy, which found their outlet in legal studies and agadistic lore. During this period the law was developed by the legal acumen, profound reasoning and keen knowledge of human nature possessed by the Talmudists. Since the compilation of the Talmud the Jewish law has not developed with the same freedom as theretofore. The migrations and persecutions of the Middle Ages, on the one hand, prevented its natural development and growth, but, on the other hand, were the cause of its preservation as it stood in the days when the Talmud was compiled. Persecution endeared the law to the Jew, and he clung to it tenaciously. The law was his only refuge from the oppressor, it was the sanctuary into which the enemy could not intrude. Devotion to the law and its study was one of the marked characteristics of the Jew in Talmudical and post-Talmudical times. Literary exercises were almost wholly confined to legal studies. The Jew grew up in an atmosphere charged with knowledge of the law and reverence for it, and it was considered the noblest task of a man to devote himself to its study. The Jew learned in the law, no matter how lowly his origin or humble his calling, was considered more honorable than the most eminent, the richest and proudest ignoramus. It followed from this general diffusion of knowledge of the law that even the veriest idler in the street could not be entirely ignorant. The Gemara in the treatise Sanhedrin illustrates this condition of affairs. The Mishnah there states that civil suits are decided by a Beth Din or Court of three men, one of whom was appointed by the plaintiff, one by the defendant, and the third by the two thus chosen. This Court of Three was not a fixed court, but was made up of laymen chosen to decide the case, after which its authority ended. Rabbi A'ha suggested that one man was sufficient to decide civil suits, as it is written in the Torah (Lev. xix, 15), "In righteousness thou (one man) shalt judge thy neighbor." The answer to this view of Rabbi A'ha was that the choice of a single judge might result in the selection of one who is unlearned in the law; to which rejoinder is made that the selection of a court of three might equally well result in the selection of three unlearned men. This objection is silenced by the remark that it is not possible that among three there should not be at least one who knows the law, having learned it by listening to the sages and the judges. (Talmud Babli Sanhedrin, 3a.)

The higher judges, the rabbis, and the members of the greater and lesser Sanhe-

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drin were, of course, deeply learned in the law, and it is perhaps not unnecessary to devote a few words to the training which qualified them for their important office.

The members of the Sanhedrin, who were both legislators and judges, were also (as a rule) the professors at the various law schools in Palestine and Babylonia. In these schools the course of study extended through seven years. The instruction was oral, and consisted of lectures and discussions which took a wide range. Some point of law was the subject; it was argued, debated and expounded; the memory of the students was developed to an astounding degree, as they relied upon it almost exclusively in all their work. All topics of human interest were discussed and the entire field of contemporary learning swept in the search for information which might elucidate the point of law under discussion. From among the students who had passed through such a course the ranks of the lesser Sandhedrin were recruited, and from these they were promoted to the great Sanhedrin at Jerusalem. Years might elapse before these distinguished honors were conferred, during which the candidate was in constant attendance at the sessions of the Sanhedrin, and occasionally called upon to act as a substitute for one of the members who was absent. In this manner he grew in the knowledge of the law, of contempory science of all kinds; he perfected himself in foreign languages; he became familiar with the systems of law of the Greeks and Romans and other nations; and when the day came that he was called to sit in judgment and make the law, he was as well qualified for his position as it is possible for man to become. Lawyers, in the sense of advocates or pleaders, were unknown at Jewish law, as the parties pleaded their own cases. In criminal cases the Sanhedrin were practically also counsel for the defendant. It was their duty to take advantage of every point in favor of acquittal, and they were not permitted to aid the prosecution. There is evidence also in the book of Job (xxix, 15, etc.) that *patrons* were not unknown. These were members of the rich and leisure class who frequented the courts of law and took charge of the cases of the weak and ignorant against the powerful and malicious to prevent a miscarriage of justice.

The Origins of the Law.

The law thus assiduously cultivated could not help becoming a highly developed system, as complex as human life itself. The rabbis felt that law must be supreme in the world and that man dare never emancipate himself from it, for the weakening of the bond of law means anarchy and retrogression to a lower social state. "If it were not for the law," said one rabbi, "man would swallow his fellow-man alive." This complex system had its origin in the simple customs of the ancient nomadic Hebrews who roamed the plains of Palestine.

There are many remains of these old customs to be found embedded in the Mosaic laws: some of them are reported in full, others are merely suggested; some are accepted as law, others are categorically rejected. The whole Torah (Mosaic code) bears unmistakable evidence of the epoch of custom which preceded it. There is no such thing as true law in primitive societies, because these have no law-making power; among them custom reigns supreme. This state of society is graphically described in the book of Genesis in the lives of the patriarchs. The patriarch by virtue of his position in the household had absolute authority over his family, which included his wife and children, his kinsmen and slaves. The law of his household fell from his lips, and his will and caprice were only restrained by the deep-rooted sentiment of conservatism which is common to all men. Every household was independent and acknowledged no law but its own. "In those days," as the chronicler says in the book of Judges (xvii, 6), "there was no king in Israel; every man did

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what seemed right in his own eyes." When the Torah was given to the people it served to give the sanction of *law* to much of what was originally mere *custom;* but there were many customs which continued as unwritten law to exist side by side with the written law or Torah.

Much of the old customary law which was not incorporated in the Torah was preserved by oral tradition from generation to generation, living in the national memory until it was finally reduced to writing in the Mishnah, at the end of the second century of the Common Era. And still there remained much of the old law which was not incorporated either in the Torah or the Mishnah, and which is preserved in the form of old Mishnayoth in the Gemara. (The Mishnah and Gemara together constitute what is known as the Talmud.) Although the Mishnah was in point of fact compiled and reduced to writing long after the Torah, it is not properly to be considered as following the Torah, but as contemporaneous with it. It was the old common law of the Israelites existing side by side with its written code, the Torah.

We know when the period of the Mishnah ended, but not when it began. The Mishnah itself bears testimony to its ancient traditional origin. The so-called "Sayings of the Fathers" (Pirké Aboth) open with the following statement of the chain of tradition: —

"Moses received the Law at Sinai, and he transmitted it to Joshua, and Joshua to the elders, and the elders to the prophets, and the prophets handed it down to the men of the Great Synagogue" (Aboth I, 1), and last of the members of the Great Synagogue was Simon the Just, who lived at the beginning of the third century B. C.

According to this tradition, both the written and the oral law began with Moses. In the introduction to his monumental Codex of the Jewish law, Maimonides gives the following account of the tradition of the law: —

"All the laws given to Moses at Sinai were given together with their commentary, for it is written (Exodus xxiv, 12), 'And I will give thee tables of stone and a law (Torah) and commandments (Mizvoth).' Torah is the written law and the Mizvoth are the commentaries; and he commanded us to perform the law according to the commentary; and this commentary is called the oral law. Moses, our teacher, wrote the entire Torah, and he gave a copy thereof to each tribe, and one copy was laid in the ark as a witness, as it is written, 'Take this Book of the Law and put it in the side of the Ark of the Covenant of the Lord your God, that it may be there as a witness against thee.' (Deut. xxxi, 26.) And the commandments (Mizvoth), which were the commentary on the law, he did not write down, but he commanded them unto the Elders and unto Joshua and the rest of Israel, as it is written, 'Whatever thing I command you, observe to do it.' (Deut. xii, 32.) On this account it is called the oral law. Although the oral law was not written down, Moses, our teacher, taught the whole of it in his court of justice to the seventy elders; and Eleazar, Phineas and Joshua received it from Moses, and to Joshua, who was the pupil of Moses our teacher, he transmitted the oral law and instructed him in it; and many elders received it from Joshua and his court of law, and Eli received it from the elders, and Phineas and Samuel received it from Eli and his court of law, and David received it from Samuel and his court of law." . . . And through him the law was transmitted to the prophets and expounded in their courts of law, and from them Ezra received it; and the judges of the court of Ezra were called the men of the Great Synagogue, and the last of them was Simon the Just. (Introduction to Maimonides' Mishné Torah.)

According to this traditional account, which contains in it the actual fact, though somewhat fancifully stated, the oral law was expounded in the court of justice presided

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over by Moses, and so on by successive generations of judges, contemporaneous with and following the Biblical period. From the time of Simon the Just (about 300 B. C.) to the time of Rabbi Juda the Nasi (about 200 A. C.), the compiler of the Mishnah, there was an unbroken sequence of Judges and Rabbis who expounded and interpreted the law, and the account of whose personality and judicial decisions rests upon no mere vague tradition, but is well established and authenticated.

The Influence of Torah on Ancient Custom.

It appears, then, that among the Israelites true law, in the strictly political sense of the term, as "a command from the supreme political authority in the state, addressed to the persons who are the subjects of that authority," first came into being in the Torah, which contained the commands of the supreme authority strengthened by Divine sanction.

As soon as such supreme authority comes into power in any community, all the customs and rules which were in force and which are not abolished by it, impliedly receive its sanction and become true law. For the supreme authority in a state has the power to change unwritten law by the enactment of new laws, if it so please; and whenever the old law is left unchanged it must be presumed to be acceptable to the supreme law-making authority, and may in that sense be said to be given by that authority. (See Sheldon Amos, "The Science of Law," p. 49.) The Torah, for instance, desires to abolish the numerous local sanctuaries in Palestine and to fix one place, Jerusalem, as the religious center of the people. It enacts therefore (Deut. xii, 8): "Ye shall not do after all the manner that we do here this day, everyone whatsoever is right to his own eyes," and then proceeds (ibid., 13, 14), "Take heed to thyself that thou offer not thy burnt offerings in every place that thou seest; but in the place which the Lord shall choose in one of thy tribes, there thou shalt offer thy burnt offerings, and there thou shalt do all that I command thee." In this case the old custom is abolished by the new law. But in such matters as the forms of marriage and divorce, the holding of slaves, the forms of purchasing and conveying land, etc., the Torah silently adopts the old customs, and they thereby receive equal sanction with the newly enacted laws.

The wisdom of Moses is exhibited in his adoption of many of the old customs which were so deeply ingrained in the people that it would have been impossible by mere legislative enactment to abolish them.

Often did Moses call his people "stiff-necked," and for no other reason than that they preferred their old laws and regulations to his innovations, although the latter were made with Divine sanction.

It is always easier to follow the old habits of body and mind than to strike out into a definite new path which association and custom have not yet rendered familiar. Hence in many cases the Mosaic law adopted *in toto* the old common customs that preceded it; in other cases, such as divorce for instance, the old law was merely modified but not abolished entirely; in but few cases was the old law abrogated and an entirely new command substituted.

Those ancient customs which are not incorporated in the Mosaic code and expressly adopted by it were, as we have seen, preserved by oral tradition. They were made permanent and fixed as rules of action and conduct by the decisions of the various legal tribunals that were established among the ancient Hebrews. The decisions of the patriarch in matters affecting his household were the germs of these customs; the decisions of the village councils or councils of elders, of the priests and the courts of three all combined to develop the customary law and fix it firmly. Nothing is so tenacious as ancient custom and tradition in maintaining its sway over the habits and life of a people.

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It was a characteristic of Jewish tradition that it was handed down with minute fidelity from mouth to mouth. The law was stated in the very words in which it was heard by the reporter, and no stronger argument could be used in any case than the citation of an ancient precedent. And it appears that even where a written record was made, the tradition by word of mouth was kept up. After the fight with Amalek at Rephidim, in which the Amalekites were utterly routed we are told in the Book of Exodus (xvii, 14): And the Lord said unto Moses, "Write this as a memorial in a book and rehearse it (lit. "lay it") in the ears of Joshua." One would suppose that the written record would be sufficiently trustworthy, yet here it seems the oral tradition was used as an equally sure method of preserving the record of that famous fight.

THE DOCTRINE OF STARE DECISIS.

By Boyd Winchester.

PROFESSOR C. G. TIEDEMAN, in an article on "The Income Tax Decisions" (Annals of the American Academy, September, 1895), says: "The rule of *stare decisis* has its limitations; and whenever the decision of a court in the interpretation of a rule of law is so far out of line with the prevalent conception of right and justice that public opinion, as it finds expression and feeling through the court, and those who legitimately influence the formation of judicial opinion, would indorse and urge the repudiation of the old ruling and the adoption of a new ruling which is more consonant with the prevalent sense of right, we learn that the court has overruled the decision in the earlier case."

We find here an idea of much greater and wider significance than is conveyed by its application merely to the development and administration of the law. Authority is a moral power which exerts peculiar influence on the minds of men in every department of life. It often leads them to adopt opinions contrary to their own convictions, and to commit acts at which their consciences, if left to themselves, would strongly revolt. Achievements veiled in a mist of the past seem marvelous, as distant objects when beheld through any dense medium will generally assume an extravagant and unnatural magnitude, and there are many who resemble the minister of whom Sydney Smith declared, "The wisdom of my Lord Hawkesbury is of that complexion which always shrinks from the present exercise of it by praising the splendid examples of it in ages past." Few individuals have indeed the hardihood to oppose a "principle embalmed in a precedent," or opinions propagated by men whom they have been accustomed to regard as their superiors in moral and intellectual excellence. From this frailty of our nature, many errors are disseminated among mankind, and much injury is done to society, by men, too, who in an honest conviction of their intentions are often led astray.

It is not necessary, in the satiric line of Pope, "to think our fathers fools, so wise we grow," but the mind delivered from the trammels of authority should assert its native freedom of thought and press onward according to its own bent in the investiga-

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tion of truth. This spirit of investigation for the truth should be, in the fine wording of Tennyson,

"Strong in will
To strive, to seek, to find, and not to yield."

Experience has shown that men of the past were liable to error, like the men of to-day. It is in truth a part of our nature. It is then a good maxim in the conduct of the understanding to adopt no opinions how imposing soever the names that support them, until one is satisfied of their correctness. Nor is this calculated, as some suppose, to unsettle opinions. Judge Story was wont to ascribe the tendency to infidelity, in regard to scientific and religious matters, to a want of proper respect to great authorities. But cannot this spirit which the learned Judge deplored be ascribed to a cause the exact reverse of that urged by him? Is not the true reason of any general unbelief and unfixedness of opinion to be found in the superficialness among us; the want of proper inquiry into the various subjects that interest the public mind? The dogmas of great men are received upon mere faith, upon naked belief, without any search into the reasonableness of them, and consequently without a consciousness of their correctness; and as these dogmas often prove fallacious, the slightly reflecting mind hastily concludes all notions may be equally so. Many, who are too impatient or too indolent to investigate, reason no better than this. Some of the opinions of some of the greatest and best men of the past have been proved to be wrong; all their opinions, therefore, may be wrong. While, therefore, so much uncertainty exists, it is useless, they reason, to fix belief. Hence a habit of doubt and unbelief is formed which, if not checked in some way, is sure to lead to general infidelity.

To guard against this, we should adopt the opinions of others with proper care and reflection. The mind that has satisfied itself of the truth of a proposition after careful analysis, is not likely to abandon it to suit every breeze of opinion. It appropriates it. It takes it into the memory as a part of its own knowledge. To be supported by a great authority affords satisfaction, it is true; but without this, the mind is contented and fixed from a consciousness of the truth of its conclusion. Very different is it with the proposition that has been barely taken into the memory without the conviction of its certainty. The mind scarcely cherishes it as its own. It is unstable. It is subject to all the whims and caprices of the fancy — at one time producing doubt, at another creating rash presumption. The mark of uncertainty is stamped on its very nature. It was governed yesterday upon the authority of Plato; to-day it is cast upon the dictum of Aristotle. From this sort of procedure there can be no knowledge except by chance. Doubt and uncertainty will always attend such information; and it is ever ready to be abandoned in conscious ignorance at the first assault of ingenious sophistry or audacious effrontery.

Before adopting the opinions, then, even of the greatest authorities, we should inquire into their reasonableness; nor look upon them as authority until satisfied of their truth. This reasoning does not conflict with the maxim, "*oportet descentem credere*," but shows the importance of joining with it another, "*oportet edoctum judicare*." Nor does it detract from great authorities the merit justly due them. It only points to the honest inquirer after truth the proper method to pursue. It only urges upon him to withhold his assent until his judgment is instructed. To pursue this course is but assuming the proper dignity of our nature. It is but shaking off a servile dependency upon others in matters touching the highest estate of man, and asserting the proud prerogative of individual freedom. The slavery of the mind is the worst form of servility. It divests man of all the no-

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bleness of character with which he is endued by his Maker. It makes of him a base tool, and in following submissively after the dogmas of others, without exerting to the extent of our ability the noble powers which God has given us to guide us in our judgments, what are we but the blind followers and slaves of others? True, we should respect great authorities and honor them; but only when we find them to be right. Our first duty is to make this inquiry. And in so doing we detract no reverence from the great teachers. We only establish our own proper dignity. "Disciples owe to masters only a temporary belief and suspension of judgment, until they are thoroughly instructed; not absolute resignation and perpetual servitude of mind. Let great authors have their due, but so as not to rob time, which is the author of authors and the parent of truth." These words are taken from the great Verulam, who, however, did not always himself pay regard to his canon of judgment. A great philosopher may lay down wise rules and yet not follow them out very clearly in practice. Now it is easy to see the bad effects of the "perpetual servitude of mind." It stops the work of improvement. The errors of one great man may continue until another great man arises: and thus we shall constantly have an interregnum of consecrated error.

It is, then, not only safest and best, but it is the duty of every rational thinker to disregard names in his various inquiries, until the truth of things is established. Truth should be our first and only object. And when a man, however humble, has once clearly discovered the truth, he should have the boldness to declare it, if it is worth communicating, against the greatest authority. This sentiment of Juvenal,

—"plurima sunt quae
Non audent homines pertusa dicere laena,"

may answer very well as a maxim of worldly policy; but in researches after truth, in inquiries touching matters that effect our welfare or the interest of our country, it should certainly have no weight. Plato has laid down on this point a much nobler precept, "One should dare speak the truth, when discoursing on truth." A blind obedience to great authorities is, in short, destructive alike of all manliness of thought and boldness of mental energy. Nothing so destroys a spirit of independence and cripples the power of the mind, as an habitual reliance on the efforts of others. Let us therefore not exalt unduly the value of precedents or conclude that whatever is ancestral must therefore be admirable. It is true that the judgments of wise men formed in times "whereof the memory of man runneth not to the contrary" should not be set aside simply because they are old. Great weight is there in the words of Edmund Burke, whose eloquence was rivaled by his sagacity. "Rage and frenzy will pull down more in half an hour than prudence, deliberation and foresight can build up in a hundred years." But it is a cheering and valuable reflection which is readily suggested to us by a view of the intellectual history of man, that nature has evidently designed us to be the ministers of our own improvement, giving us a spirit which never can acquiesce in its present attainments. If the conviction that we and all that surrounds us have been so largely determined by the past sometimes weighs on us with tyrannous power, the thought that we in our turn are shaping the destinies of future generations becomes a moral motive of almost irresistible force, compelling us to high resolve and dutiful action. The greatness of the past chiefly consists, not in its being fruit, but in its being germ. Plutarch warns young men that it is well to go for a light to another man's fire, but by no means to tarry by it instead of kindling a torch of their own; and says that when Cicero as a young man visited the oracle at Delphi, the advice given him was to make his own genius, not the opinion of others, the guide

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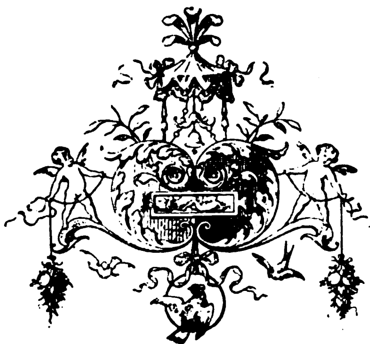
of his life. Lord Bacon compares those who value the wisdom of the past as an *end* rather than as an instrument for the discovery of truth, to the suitors of Penelope who preferred the handmaid to the mistress. We should do justice to the past without enslaving the present, with one hand clinging to past and approved foundations, with the other seizing and incorporating all new material — giving full freedom to the thought of the present without forgetting that it in its turn must be transcended by the widening consciousness of the future.



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LONDON LEGAL LETTER.

LONDON, May 6, 1896.

THOSE who are interested in the efforts which are being made to bring about uniformity of legislation in the various States of the United States would do well to keep their attention fixed on the progress of the law in this country with respect to corporations or, as they are commonly spoken of here, "public companies." It is impossible to make an Englishman understand why a corporation, organized to do business in the State of New York, should obtain its charter from the State of New Jersey or the State of West Virginia; and there are other anomalies that appear equally incomprehensible. While these peculiarities do not exist here, there have been possible certain practices under which the shareholders' money has found its way into designing men's pockets, and nothing in the way of advantage has accrued in return to either the shareholders themselves or the creditors of the company. When it is known that the total capital of the companies organized in Great Britain last year represents $1,575,000,000, or more than the united investments of Germany and France in corporation shares combined, it will be readily understood how jealous the legislature should be to protect the interests of the investors, and that legislation affecting such an enormous sum demands great care. A bill is now pending in Parliament to amend the existing laws, but, while the necessity of some reform is recognized, a certain difficulty is experienced from the fear of making it too drastic; but the facilities for the formation of companies which now bring so much business to England may be curtailed, or their administration may be embarrassed, or the best class of men be debarred from becoming directors.

So far as principles are concerned, the laws as to the formation and regulation of public companies in England and the United States are very much alike; but there is one feature peculiar to the English act that it would be well to imitate in America, and that is "the prospectus." Here almost every company which invites the public to subscribe to its shares issues a prospectus, and the law requires that in this prospectus shall be set out the nominal capital of the company; the number and description of the shares; the terms of issue; the names of the directors, bankers, solicitors, brokers, auditors and the secretary; the objects and prospects of the company; what contracts have been entered into, and where copies of the memorandum and articles of association and of the contracts can be seen. It is absolutely necessary that this prospectus should disclose every material fact affecting the company, and if it does not, or if it contains any misrepresentation or any deceptive or misleading statement, or one which is so ambiguous that it is not true in every sense in which it might be understood, the subscriber who has subscribed for his shares upon the faith of it may repudiate the allotment which has been made to him, and may, also, sue for damages or compensation those who issued the prospectus and others who are by statute responsible. As even under this regulation many frauds are committed, the bill now pending provides that the prospectus must disclose everything which could reasonably influence the mind of an investor of average prudence, especially the real facts as to the sale of the property and all amounts paid for the promotion or the subscription of shares.

As there is no more frequent cause of disaster to a new corporation than allotment of shares on insufficient capital and an attempt to embark upon the business of the company with a practically empty treasury, which entails the necessity of mortgaging the company's franchises or the issuing of debentures, the amendment to the Companies Acts provides that the memorandum or articles of association shall state the minimum subscription upon which the directors shall proceed to allotment; and it is furthor provided that at least seven days before the first statutory meeting the directors shall forward to every shareholder or subscriber for shares a statement of the position and prospects of the company, and all other information to their knowledge, including the total number of shares which had been allotted and what has been received for them. This is to enable the shareholders, if they think fit to do so, to review their position and prospects. In order to prevent the evil of debt in the way of mortgages and debentures, it is proposed that within seven days of their creation all mortgages and charges of any kind affecting the assets of the company shall be registered with the official registrar of public companies; and this wise provision is supplemented by another requiring an annual audit, and that a copy of the balance sheet shall be sent to the registrar within thirty days after the meeting at which it is presented.

If this bill becomes a law, and there is every likelihood that it will, it will certainly minimize the risks which investors are now exposed to, as it will be practically impossible for a promoter of a company to delude the public by false statements, while the very fact that a share is allotted and issued to a subscriber will be a proof to him that the rest of the shares up to the minimum required have been similarly allotted and issued to others. Having taken an interest in the company with this comfortable assurance, he may have the further satisfaction of knowing that the directors of the company cannot incur a permanent debt without his becoming at once aware of it, and that the annual balance sheet is always open to his inspection. These provisions will also form an unusual security to creditors of the company.

The General Council of the Bar has recently held its thirteenth annual meeting, and while it did not attract a large attendance of the upper branch of the profession, it was nevertheless a gathering of some importance. It is a voluntary association whose object it is to take care of the interests of barristers as the Incorporated Law Society looks after those of solicitors. The General Council of the Bar is this year, for the first time, in receipt of an allowance of £600 a year from the

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Benches of the three Inns of Court, and on the strength of this increase to its income it has taken permanent quarters and set up a permanent official staff. It has standing committees on (*a*) the Business and Procedure of the Courts; (*b*) on Court buildings, and (*c*) on matters relating to professional conduct. The only matter of general interest to the public upon which any action was taken was as to the practice of a son of a county court judge practicing before his father. The custom has, it is alleged, grown into abuse in some parts of the provinces, where solicitors are in the habit of briefing the sons, not on account of their superior merits, but because it is presumed they have readier access to their fathers' ears. The Council are of opinion that "whilst it is unobjectionable for a barrister in the ordinary course of a general practice to accept a brief in a court of which his father or other near relative is a judge, it is not right for such a barrister specially to devote himself to practice in that court. It is almost inevitable that partiality will be suspected, even although there may be no real ground for such suspicion. The practice might even lead to briefs being delivered to the barrister because it was believed his client would have an unfair advantage over his opponent."

It is a pity that the Council, having taken some steps toward ridding the Bar of an abuse, cannot have the courage to turn their attention to the Bench. There are now no less than eight occupants of the bench who are entitled to retire on a pension. These are Lord Esher (the Master of the Rolls), Lord Justice Lindley, Lord Justice Lopes, Lord Justice Kay, Baron Pollock, Mr. Justice Hawkins, Mr. Justice Matthew and Mr. Justice Cove. All have served at least fifteen years, while several have covered more than a period of a full generation. They are learned and upright men, but as no one is elevated to the Bench until he has attained middle age, at least, most of them are now old men. They cannot have the activity and energy of youth nor the patience and sympathy and even-mindedness which are popularly supposed to attach to judicial functions. Lord Esher, who is over eighty years of age, has recently been the subject of very severe criticism by the writer of a letter in the "Law Review," who asserts that the members of the Bar are invariably insulted in the court of appeal over which Lord Esher presides, and that many leading practitioners decline to appear there, because they are unwilling "to become the butt of Lord Esher's buffoonery." The writer further professes to know that "Lord Justice Rigby arranged to relieve the Court of his presence for two terms last year in consequence of the treatment of counsel by its noble and learned president," and that Lord Justice Lopes has remonstrated with the Master of the Rolls in language extra-judicial. There are other judges who have an equal disregard for counsel and an impatience of audience which is hardly consistent with justice. If the question of making the retirement of judges upon a pension compulsory after fifteen years' service, instead of voluntary, were left to the Bar, it would be carried by a very large majority.

STUFF GOWN.

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BY IRVING BROWNE.

CURRENT TOPICS.

More Handwriting. — It is strange that when the Chairman was lately speaking of his cherished correspondents who write or wrote good hands, he should have omitted one, who fortunately is still in the land of the living, and who writes the best hand of all — Horace Howard Furness, of Philadelphia, the most celebrated of living Shakespearian scholars. His is a noble and monumental chirography, as regular as a Philadelphia block of houses, grandly legible and elegantly fluent — a John Hancocky hand. It is a distinction to receive one of these magnificent letters. Let us pray that the great editor may never have pen-paralysis and be reduced to the humiliation of a typewriter!

Philosophers have made various and ingenious attempts to define the animal Man. At first thought it might seem that a perfect definition would be, an animal that forms collections. But it must be admitted that the magpie also does this. What has not the animal Man collected? Clocks, watches, snuff-boxes, canes, miniatures, paintings, prints, fans, laces, precious stones, china, coins, paper money, spoons, tulips, orchids, hens, horses, match-boxes, postal stamps, books, book plates, violins, show-bills, play-bills, swords, buttons, shoes, slippers, spools, lead-pencils, birds, beetles, butterflies, saddles, skulls, wigs, death-masks, knockers, lanterns, crystal balls, shells, penny toys, teapots, armor, pipes, rugs, arrow-heads, locks of hair and key-locks, hats — these are some of the most prominent subjects in search of which the animal Man runs up and down the earth and spends time and money without thought or stint. The most important item in this list is books; next to that comes paintings, and then autographs and manuscripts. A Boston (or at all events a Massachusetts) man, who died a few years ago, left a collection of autographs, which he had valued at ten thousand dollars, but at which valuation his friends skeptically smiled. On his death his executors inventoried them at this sum; but by putting them up at auction — having been persuaded to issue a catalogue in considerable numbers — they brought fifty thousand dollars! What sum would not an authentic autograph of Shakespeare bring?

The Chairman never had this craze for acquiring autographs, but he did once own four autographs of celebrated Americans, two very good and two very bad men, and it so happened — to the confusion of those sapients who read character in handwriting — that the bad men wrote the finest and most candid hands. To take the good ones: First, there was a letter from President George Washington to John Hancock, governor of Massachusetts, asking that commonwealth for the loan of a ship to carry Colonel Laurens as minister to France — "a very interesting specimen," as the collectors would say, in admirable preservation, and characterized by some of that invaluable misspelling that marked nearly all the writings of the father of our country — "corrispondent," for example. The other good one was a school composition, written by Master Edward Everett, at the age of eleven, on "The Advantages of Public Instruction." Experts would read in this youthful production the characteristics of the man — it was precocious in handwriting, in rhetoric, in thought, in scholarship; in short, it was wondrously like and would not have disgraced the grown-up Edward. It was prefaced by a quotation from Cowper's "Tirocinium," or Praise of Schools — how many of our readers have ever heard of that? It was sophomorical, but the mature Edward was always rather sophomorical. It was probably inspired by the refusal of Master Edward's father to let him go to boarding or public school, and his persistence in the old fashion of private tutors. Neddie predicted all sorts of bad luck and disgrace to the victims of this unwise parental rule. Then the bad ones: First, a fragment of a letter from Benedict Arnold, partly destroyed by fire, in which he complained of "unjust and cruel aspersions upon my character." The handwriting was superb — bold, fluent, legible — the perfection of a commercial hand — much superior to the formal and precise hand of the good George. Then came a letter from Aaron Burr to his daughter Theodosia, introducing Colonel Brandt, "the indian (*sic*) chief," "not one of those indians who drink rum, but a gentleman," who "writes and speaks the english (*sic*) perfectly," "a man of education," etc. He desired Theodosia to buy him some gift for his daughters — say, a pair

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of earrings, and signed: "Vale et ama, A. B." The handwriting was small, legible and precise, and did not at all suggest the unscrupulous and ambitious office-seeker and the bold adventurer and filibuster. These handwritings would greatly puzzle and confuse the English wizard in chirography of whom we lately discoursed. The Chairman wishes he still possessed those four autographs, that he might leave them to be sold eventually for the benefit of his family, for they would bring ten times what they brought him. Besides, he could comfort himself, in looking at them, by the reflection that the capacity of writing a good hand by no means ensures a good character!

AN UNIQUE BOOK. — Our old friend, Judge Bradwell, of the "Chicago Legal News," sends us a little book which shows among the ten thousand sheep-clad volumes by which the Chairman is surrounded, like a violet among potatoes. "Short Stories by Myra Bradwell Helmer, age six years," is the title, and the author is the Judge's granddaughter, and the thirty-eight little pages are dedicated to him. It is adorned with beautiful portraits of the small author and her big grandpapa, who printed it, and takes "his pay in kisses." There are also fancy pictures of some of the characters of the stories. She is "to take one dollar of the money and give for the monument to Eugene Field. All the rest is for the orphans and sick babies. The book is twenty-five cents. I hope I will make lots of money for the orphans." So does the Chairman, bless her heart! Mr. Justice Brewer will please take notice. The contents were "talked, and mama wrote it down for me just as I talked it." There is no doubt of that! What a legal ancestry this little tot has, to be sure! — grandfather, grandmother, father and mother — quite unique, we take it. May she live to write longer stories! Meanwhile the Chairman will proceed to read these aloud to his own grandchildren, and he himself finds them a great deal more entertaining than Mrs. Ward's preachments or Marie Corelli's grumblings, and much more understandable than Browning or Meredith.

AUSTIN ABBOTT. — The news of the death of this distinguished man, at the age of sixty-five, will be received with great regret by the American Bar. He was one of the most erudite, but most modest of lawyers. His life was spent in teaching others. As a lecturer, as an editor, as an annotator, as the compiler of a great number of digests and works on practice, and as the author of many briefs on which loud and pushing lawyers have made great reputations in causes of importance, he has left a deep mark in our jurisprudence. He chose this walk as more in consonance with his scholarly tastes and his lack of physical robustness, than the noise and strife and anxieties of courts. He took a deep interest in international law, and was an influential member of bar associations, both National and State. A man of general culture too, and of refined and courteous manners, he endeared himself to all his acquaintances. His erudition never degenerated into pedantry, he was never dry, and he had an attractive and striking style. His capacity of discrimination was exquisite and unerring, and his clearness and conciseness were admirable. He came of a very distinguished family. His father was Jacob Abbott, author of many attractive books for children; a nephew of John S. C. Abbott, author of a "Life of Napoleon the First," very popular, and especially grateful to the nephew of his great uncle; a brother of the deceased Benjamin Vaughan, a well known and legal digester and compiler; and a brother of Rev. Dr. Lyman Abbott, editor of the "Independent." This is a remarkable family record. The Chairman's earliest reading was Jacob Abbott's "Rollo Books," and among his latest is Austin's "University Law Review," the very best periodical of its class. We wish our brother could have lived longer, but he lived an admirable and spotless life, and his works and his personal influence will long follow him.

HUMOR AND LITERATURE ON THE BENCH.—The retirement of Judge Finch from the New York Court of Appeals, in January last, on arriving at the age of seventy years, was the occasion of a dinner given to him in the city of New York, and of remark thereupon by Charles Dudley Warner, in "Harper's Magazine." Some discussion arose at the dinner as to whether humor and the literary faculty were not a hindrance rather than an aid to a judge. Having the example of their guest before their eyes, the diners concluded that they were not, and in this conclusion Mr. Warner, after a good deal of writing, vaguely concurs. Judge Finch was not a humorous judge in the sense that Chief Bleckley is, although he had a quiet, shrewd humor, but he was the best writer, especially in the statement of facts, that ever sat in that court, not excepting even Judge Porter, who was a fine rhetorician; and his literary gift has been equaled on the bench of this country in recent years only by the late Mr. Justice Bradley. Judge Finch has written some beautiful poems. Some of his college songs were sung at the dinner, and "The Blue and the Gray" and "Nathan Hale" are exquisitely tender and pathetic, marked by the sweetest humanity and the loftiest patriotism. These things never hurt his judicial career a whit, for he demonstrated that he had the strong intellectual grasp and

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the wide legal learning that belong to a highly competent lawyer. It does not seem to have occurred to the diners, nor to Mr. Warner, that the poetical faculty and keen humor did not interfere with the judicial career of the late Lord Justice Bowen. It does not seem to be necessary to a good judge and a sound lawyer that he should not be able to understand a joke or write an agreeable and unambiguous style. A competent judge is not necessarily a dull person, although he sometimes is. Judge Finch has retired from the bench, but he is still active in a department of grave responsibility — as dean of the Cornell University Law School, in which he will doubtless put his stamp on many a nascent mind seeking a legal training. Wise, like Ulysses, he has sought his early home at Ithaca to spend the evening of his days. As he sits there on those wooded heights and looks over that beautiful campus and down upon that smiling lake, let us hope that some fresh poetical figures may come before his mind, and that as Bryant in his manhood in the busy city yearned for the Green River of his youth, so our honored Judge may sing with fruition: —

> "An image of that calm life appears
> That won my heart in its greener years."

WHY RIKER WAS NOT MADE JUDGE.— An attempt was made to insert in the proof of the sketch of Richard Riker, in our April number an explanation of the fact that he never rose to the Supreme Court bench, but tyrannical printers would not allow it. The explanation is given to the present writer by Chief-Justice Daly, as follows: "When a successor was to be appointed to Kent in the Supreme Court, Riker became a candidate for the office, and relied for getting it on the Clintonians, who controlled the Council of Appointment; but as they had combined with the Federalists to defeat the Democrats, and were unsuccessful, the office was given to the Federalists, and Judge Platt was appointed; upon which Riker separated at once from DeWitt Clinton, and joined the 'Bucktails,' the Tammany party of the day," which, of course, goes to show the superior purity of an appointed judiciary to one elected by the popular vote.

NOTES OF CASES.

BOOK AGENTS. — Here is a valiant blow at a public enemy: —

"Judge McKinley, of one of the superior courts of California, has recently rendered a decision upon a novel question. He holds that the owner of a public office building, rented to tenants, who use the rooms for offices of lawyers, real estate agents, etc., has a right to exclude book canvassers from the building, and that such a person has no right of action for damages by reason of such exclusion, it appearing that the owner offers to allow him to go to any office in the building upon the express request of the occupant. The decision seems to be a sound one. The effort of the landlord is simply to protect his tenants from a well-known species of nuisance. The question of the propriety of his action seems to be a question solely between himself and his tenant. It can scarcely be implied, in his contracts of letting with his various tenants, that he dedicates the building to public use in the same sense in which the public highway is dedicated to such use, — in the sense which allows it to be used by tramps, peddlers, book-agents, and every other kind of people that annoy the occupants of offices and take their time from their work. It would be difficult to state upon what proposition of law the landlord assumes any duty toward a book-agent, by the mere fact of building a large building and renting it out to different occupants, to be used as offices for their own purposes."— *Am. Law Review*

THE IRRIGATION CASE. — Another important case pending under advisement in the United States Supreme Court is that concerning the right of a corporation to condemn land for irrigation purposes on the Pacific slope. In that part of our country, the Scripture does not hold good that "the rain descendeth on the just and on the unjust," for it does not fall to any considerable extent on either, and both have to depend on dull ditch-water. Judge Dillon has been arguing on one side, and is to be congratulated at least on having a question that is not dry. No doubt he ransacked and exhausted the history of artificial irrigation, and drew a pleasing picture of those brown limbed and symmetrical Eastern women who water the parching fields by means of a dish, rope, and pliant pole. We think him capable even of gracefully bringing in Woodworth's old song, "The Old Oaken Bucket." That court has sometimes been induced by such appeals to the emotions to lay down some very bad law, as for example in the Dartmouth College case, where Webster, observing Horace's injunction, himself wept and so made Chief-Justice Marshall weep, by his "Et tu, Brute!" (which, by the bye, Caesar never said). But it would be a harmless victory when a court could be won by simply treating them to cold water.

UNLAWFUL DISSECTION.—In Foley *v.* Phelps, the New York Supreme Court, appellate division, have recently held that a civil action will lie in favor of a widow for damages for the unlawful dissection of the remains of her husband. The "N. Y. Law Journal" commenting editorially upon it, says: —

"The opinion of Judge Patterson in Foley *v.* Phelps, printed on the first page to-day, offers an interesting illustration of the method of the development of jurisprudence by common law methods. It is held that a wife, as such, may recover damages for the unlawful dissection of the remains of her husband. That such a cause of action exists is also held in Larson *v.* Chase, 47 Minn. 307, cited

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and followed in the opinion. The contrary rule has been laid down in a case where the deceased died suddenly and an autopsy was performed by a physician at the establishment of undertakers to which the remains had been conveyed, in order to enable the physician to give the certificate as to the cause of death required by law. Cook *v.* Walley, Col. 27 Pac. R. 950. In the present decision of the Appellate Division the fact that the dissection was unlawful is referred to as a material factor of the cause of action. Conversely it would seem that the circumstances that a dissection was authorized either by statute or municipal ordinance would render its performance, if decently and properly conducted, non-actionable."

The Minnesota Court cite Meagher *v.* Driscoll, 99 Mass. 281, holding that where one entered on another's land and dug up and removed the dead body of the child of the land-owner, the latter might recover damages for the mental anguish thereby caused.

UNCHASTITY OF WITNESSES. — A Kansas gentleman kindly points out that in our recent note on this topic we erred in arraigning Kansas, and that the Supreme Court of that State held, in State *v.* Brown, 55 Kansas, 766, that on a prosecution for rape, where the prosecutrix is above the age of consent, evidence of her reputation as to chastity is admissible on the question of consent. He adds: —

"As another authority supporting the general rule on this subject, as stated in the above quotation from your article, see Craft *v.* The State, 3 Kan. 450. Attention is particularly called to the language of the Court on page 480, which sounds very like a passage from Decameron or Paul De Kock. From the exuberant wealth of illustration given, the inference is well-nigh irresistible that the Court had been there itself. The opinion was written by the inimitable Chief-Justice Crozier (now deceased), also the writer of the opinion in Searle *v.* Adams, 3 Kan. 515, known far and wide as 'the hot weather case,' and which, ever since its publication, has been fitly accorded a prominent place among the curiosities in law literature."

Our correspondent will accept the Chairman's thanks for pointing out these choice bits of judicial rhetoric, and we cannot refrain from reproducing here the exordium of the "hot weather case," which was as follows: "In this case the irrepressible statute of limitations is again presented for consideration. For some years past upon the disposition of each succeeding case involving a construction of this statute, it was considered by bench and bar that fiction itself could scarcely conceive of a new question to arise thereunder, but as term after term rolls around, there are presented new questions comparing favorably, in point of numbers, with Falstaff's men of buckram, thus adding to the legions that have gone before a new demonstration of the propriety and verity of the adage that 'truth is stranger than fiction.' With the heat at ninety-eight degrees of Fahrenheit in the shade and the newspapers teeming with reports of the ravages of our great common enemy, who, the more effectually to accomplish his double purpose of capturing the imprudent and frightening the timid, has assumed the form of the Asiatic monster, it might be supposed by the unthinking that the consideration of such questions would be entered upon rather reluctantly. But we beg to disabuse the public mind of any such heresy. Cases might be imagined where 'smashes' would not stimulate, nor 'cobblers' quicken, nor 'juleps' invigorate; but a new question under our statute of limitations, in coolness and restoring power, so far exceeds any and all of these, that when one is presented, the 'fine ould Irish gintleman's' resurrection, under the circumstances detailed in the song, becomes as palpable a reality as the 'Topeka Constitution or the territorial capitol at Mineola.' The powers of a galvanic battery upon the vital energies are wholly incomparable to it. So that the consideration of this case, upon this day of wilted collars and oily butter, should not entitle the Court to many eulogies for extraordinary energy in the fulfillment of its duties."

LIQUOR SALES BY CLUBS. — The Court of Appeals of New York has just decided the vexed question of the amenability of a social club to the excise laws for furnishing liquors to its members. The decision in People *v.* Adelphi Club, New York, is that such clubs do not sell, but merely distribute liquors. To the same effect: Seim *v.* State, 55 Maryland, 565; 39 Am. Rep. 419; Tennessee Club *v.* Dwyer, 11 Lea, 452; 47 Am. Rep. 298; Graff *v.* Evans, 8 Q. B. Div. 373; State *v.* St. Louis Club (Mo.), 28 S. W. Rep. 624; Piedmont Club *v.* Com., 87 Va. 541; Barden *v.* Club (Mont.), 25 Pac. Rep. 1042; State *v.* McMaster (S. C.), 14 S. E. Rep. 290; Koenig *v.* State (Tex.), 26 S. W. Rep. 385; State *v.* Austin Club (Tex.), 30 L. R. A. 500.

To the contrary: Com. *v.* Pomphret, 137 Mass. 564; 50 Am. Rep. 340; Newark *v.* Club, 53 N. J. L. 99; People *v.* Soule, 74 Mich. 250; 2 L. R. A. 794. And so under local option laws: State *v.* Neis, 108 N. C. 787; People *v.* Andrews, 115 N. Y. 427. And so when the club was a mere device to evade the law: Rickart *v.* People, 79 Ill. 85; State *v.* Mercer, 32 Iowa, 405; State *v.* Horacek, 41 Kan. 87; State *v.* Bacon Club, 44 Mo. App. 86; Kentucky etc. Club *v.* Louisville (Ky.) 17 S. W. Rep. 743; State *v.* Easton, etc., Club, 73 Md. 97.

Inasmuch as the "distribution" by the club is for money, it is difficult to distinguish it from a sale. The brief for the People in the principal case, by Messrs. Eugene Burlingame, District Attorney, and John T. Cook, Assistant District Attorney, is a cogent and ingenious argument, and a valuable repertory of the authorities.

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The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

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

THE GREEN BAG.

OUR "Disgusted Layman" thus frees his mind upon "Dog Law": —

Editor "The Green Bag."

Mr. Roscoe Pound, in his article in your April number, is rather too ironical for a layman, pleased or disgusted, to follow into the meat of his views, but one "Disgusted Layman" kicks at several bits of dog law that Mr. Pound intimates are the real stuff.

I don't believe it is law, in Michigan or anywhere else, that it isn't actionable for a dog to soil freshly painted steps. Why shouldn't the owner of such a dog pay the damage as well as for any other mischief the dog may do? Of course shooting the dog for it is a gray horse of another color. The step man ought to have a right to collect damages from me if my dog spoilt the painting of his steps, and if he shot the dog, I ought to have the best kind of a right to collect two hundred dollars from him, for I wouldn't take that for my dog under any circumstances. Your Disgusted Layman is the most ardent of dog-lovers, but for all that he is "disgusted" at the asininity of many dog-owners who howl about somebody shooting their dogs when those dogs have come to be common nuisances to a neighborhood, and their owners know it, and never try to keep the nuisances within bounds.

I'd like to know why in thunder the "law has no respect for the characteristics and prejudices of dogs"? Judge Finletter of Philadelphia stands as high as the next Common Pleas judge in the country, and he laid it down that if a visitor came to the front door he was all right, and if bitten by the watchdog, could recover damages; but if he went snooping around back doors he was a trespasser, and if the dog bit him, it was the visitor's lookout, and that is just what every sensible watchdog will do every time. Isn't that taking notice of the "characteristics and prejudices of dogs"?

There is one piece of stupidity, very ancient, none the less stupid because of its ancientness, nor the less ancient because of its stupidity, that makes a dog a wild animal, not property. How any rustyfuss can say that a sheep worth $1.50 is property, while the sheepdog that tends the flock, whose training alone cost $50 (if paid for, or is worth that), is not property, is truly typical of Bracton, and almost worthy of the Supreme Court of Alabama, that held that the Alabama statute making dogs personal property, and subject of larceny, was no good because it didn't specify whether the larceny was petit or grand! That's Bractonish for you, all over.

However, the champion stupid law as to dogs belongs right in your revered Massachusetts, which provides certain restrictions and penalties about dogs "wholly or in part of Great Dane blood"! Now just imagine Judge Gray, Judge Hoar, or some such, listening to the arguments of lawyers, not any one of whom knows a smooth St. Bernard from a mastiff, or a foxhound from a pointer, and to a lot of testimony from expert dogmen as to whether Jumbo is all mastiff or ninety-five per cent mastiff and five per cent Great Dane! Then, the most expert judge of dogs that ever lived will often be stuck to decide whether a certain dog is most mastiff or Great Dane, or wholly of one or of the other. So don't you Massachusetts lawyers hold your noses too high on dog-law.

YOUR DISGUSTED LAYMAN.

LEGAL ANTIQUITIES.

THE ordeal of water was actually practiced in England down to the year 1712, when Chief-Justice Parker declared that if the trial by water caused the death of a suspected witch, he would hold every person engaged in it guilty of wilful murder. And in 1751 a man named Colley, who, notwithstanding this warning, had been one of a party to try a witch by the water ordeal, in the course of which she sank and died, was convicted of murder and executed.

FACETIAE.

A JUDGE in Texas, newly appointed under the reconstruction acts, was asked by an attorney

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to have some witnesses *recognized* to appear at the next ensuing term of the court. They were accordingly brought before his Honor, who scrutinized them very carefully, apparently puzzled as to his duties in the premises, and then called the next case. The attorney, thinking this an oversight, called the attention of the judge to the matter of recognizance. "Oh, yes," replied his Honor, "that is all right; I am a good hand at remembering faces, and shall certainly know them again."

A FRIEND once urged Lord Shand to come skating. "It is not," he pleaded, "beneath the dignity of a judge to skate."

"No," said the Judge, "but it is beneath the dignity of a judge to fall."

AT a recent meeting of a board of Prison Commissioners the following suggestions were made: —

"That the prisoners in the jail be locked in their cells as much as possible, that their food be diminished in quantity and quality; and that a minister of the Gospel should be employed, or otherwise obtained to hold frequent and protracted discourses in the jail; and all with a view of making the prison a place of punishment."

MANY years ago, in one of the Western counties of Missouri, one Jackson Violet became deranged and tried to kill his wife. He had read that without the shedding of blood there could be no remission of sins; and he was seeking to obtain remission. A jury was selected and sworn to try the question of his sanity. Col. A—— was foreman; and after hearing the evidence a verdict was drawn up and signed by the foreman as follows: "We, the jury empaneled and sworn, well and truly to inquire into the *consanguinity* of Jackson Violet, do *hereby concur in the affirmative.*"

One of the jury, giving him a nudge, said: "Colonel, that is not right." "Why not?" replied the Colonel. "You are not trying *consanguinity* now," was the answer. Then turning to another one of the jury, the Colonel said: "Squire E——, is it *consanguinity* or *insanguinity?*" E—— replied, "It is neither." "Then," said the Colonel, "we'll put it *non compos mentis.*"

IT is said this same Col. A——, while acting as circuit clerk, made his record read: "The sheriff is ordered to adjourn court *sina qua non.*"

PROFESSOR. — "What is homicide *se defendendo?*"

LAW STUDENT. — "It is where a man kills himself in self-defense."

ON one occasion, before Judge ——— of the N. C. Supreme Court, a lawyer, who had evidently before court met been "practicing at another bar," was addressing the jury in a rather excited way, and making rather striking gestures and attitudes. A lawyer coming up to the bench said to the judge, *sotto voce*: "Col. A——— is rather theatrical to-day." "Yes," said the judge, after noticing him a moment, "He does seem a little *dram*-atic."

NOTES.

OLD Chancellor Walworth of New York was a lawyer who would no more have been suggested as capable of a jest, than a Blackstone or a Greenleaf. Yet Saratoga tradition hath this: A baker of that village, in which the jurist had his residence and chambers, undertook in the absence of his solicitor to make some remarks about his own case then pending. "Save your eloquence," said Walworth, "Mr. Baker, for it is legal tradition that a Master of the Rolls cannot instruct a Chancellor."

JOHN ANTHON, author of a treatise entitled "Anthon's Nisi Prius," that, although seventy years old, has not lost its virility of comment or advice to students, owned a bust of Hamilton, to which he gave the post of honor on his office table. Shortly before Burr's death the latter, still engaged in practice, called on Anthon for a consultation. While Burr was talking, Anthon unconsciously and mechanically stroked the cheek of the bust with the feather end of the goose-quill in his hand, and then seeing Burr gazing at the action, became somewhat embarrassed, remembering the duel, and threw down the pen. "Don't mind me, John," said the other. "I bear him no malice, and it was my pistol that added to his notoriety."

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THE late Lord Chief-Justice of England used to tell his friends this anecdote at his own expense: —

Driving in his coupé towards his court one morning, an accident happened to it at Grosvenor Square. Fearing he would be belated, he called a near-by cab from the street rank and bade the Jehu drive him as rapidly as possible to the Courts of Justice.

"And where be they?"

"What, a London cabby and don't know where the law courts are at old Temple Bar!"

"Oh, the law courts, is it? But you said courts of justice."

On his way to his judicial seat the Chief Justice saw at once that a line was drawn in the common mind between law and justice. As if, for instance, while one was dispensed the other was dispensed with.

COUNSEL in a case lately pending for trial in the New York Surrogate Court had his question met with the answer, "the matter slipped my mind."

"In other words, you forgot such an important event."

"No, I haven't forgot it."

"Pray, sir, what difference is there between forgetting a matter and having it slip from your mind?"

"Well, counsellor, it is this way: A thing slips from the mind, but by and by you remember it. But if you forget a thing it never comes back."

His Honor made note of the distinction.

BOTH lawyers and laymen down in Cumberland, Maryland, are fond of relating an incident in the Cumberland Circuit, which many of them are capable of doing with real dramatic effect. During their lives the De Vecnion brothers were at the head of the Maryland Bar. When Thomas died, his executor found his books in a very confusing condition. One unsettled claim for a large sum was against a client for whom the deceased had labored long and successfully, but to the detriment of his general practice. Suit was brought by the executor to recover this money, and the surviving brother appeared for the executor on the trial. While the trial was in progress, the defendant at every possible opportunity belittled and scoffed the recognized ability and integrity of his dead counsel. No attention was paid to these insults by the prosecution.

Finally, the brother rose to sum up. He related the story in the evidence, showing that for years the deceased lawyer had labored incessantly and at great sacrifice for the defendant, whose fortunes had been retrieved by the attorney's skill and wisdom. He referred to the talents of his brother and the estimation in which they were held by the community. At almost every word he was interrupted by the sneers, hisses, and scoffing of the heartless defendant. At length, pained and saddened beyond expression, and unable longer to endure the taunts of the dead brother's defamer, De Vecnion turned his livid, grief-stained face toward the defendant. He raised his hand, and pointed his finger at the jeering fellow, and was apparently about to make a passionate remonstrance. But suddenly his arm dropped, his expression changed, and with tears coursing down his cheeks, he slowly exclaimed: "*Sneer at me if you wish; but do not defame the brain that thought for you, the tongue that talked for you, and the hand that wrought for you: for they are now peacefully at rest beneath the sod of the valley.*"

De Vecnion sank down, completely overcome with grief. It seemed to those present as if the spirit of the maligned man had come into the court-room, and solemnly spoken the words.

PRIOR to 1838–9 grand jurors were allowed no pay for their services under the laws of Missouri. The Legislature enacted during the session of 1838–9 an act allowing jurors one dollar per day and mileage. This incurred the displeasure of the County Court of Van Buren County in said State, as shown by an order of date August 5, 1839, duly entered of record, to wit: "On motion it is ordered that pursuant to an act *past* at the last General Assembly of the State of Missouri granting of grand jurors the wright of pay for their services *is hereby rejected* and this court say that the Grand jurors of this county *shall not be allowed pay hereafter.*"

On the same day the same court entered also of record the following order: "On motion it is ordered that the act entitled an act granting of License for Dramshops, approved February the 13th, 1839, be and the same is hereby rejected by

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the county court of Van Buren Co. at the August term, 1839." It may seem novel at this day that such a court would assume the power thus to *repeal* acts of the Legislature at will.

The same court made this remarkable order, of record June 18, 1858: —

"On motion and on petition it is ordered that a review of a road be made running from Harrisonville the nearest and best rout to Harmony Mission in Bates County. It is further ordered that John Parsons, David Hugt and James Porter be appointed reviewers of said road And that they review the same according to law and make their report If practible at the August Turm of said court and if not practible *on account of Hot weather and flys* then to make their report at the Nov turm without fail."

LITERARY NOTICES.

A DELIGHTFUL number is the May issue of CURRENT LITERATURE, collecting, as it does, the best poetry and prose from all current sources in language. Among the most important features where all are good, are: a selected reading entitled, "The Babe in the Road," by S. Baring-Gould; a thrilling chapter, "In the Paneled Parlor," by Frances Hodgson Burnett, from her new book, "A Lady of Quality"; a strong battle picture by J. Blondelle-Burton, entitled, "Sea Fight at La Hogue"; "Political Americanisms," by William S. Walsh, giving the origin of many well known political phrases; a selection of "Burning Words from Brilliant Writers," by Josiah H. Gilbert; and "The Library Table," six pages of capital condensed book reviews.

IT is said that Mexican millers have to pay thirty-two separate taxes before they can get wheat from the field to the consumer in the form of flour. This is of a piece with the whole system of taxes in Mexico, which is set forth by David A. Wells in an article, on "Taxation in Literature and History," in APPLETON'S POPULAR SCIENCE MONTHLY for May. Some very curious and oppressive taxes prevailing in France before the Revolution are described in the same paper.

THE tale of "The Last Duels in America" is told in detail in LIPPINCOTT'S MAGAZINE for May by one of the principals in both, William Cecil Elam, now an editor in Norfolk. He tells it without rancor or bravado, and incidentally throws light on a state of society and public opinion now — in that respect at least — happily of the past.

A PECULIAR signification attends the article "Men Who Might Have Been Presidents," by Joseph M. Rogers in the May NORTH AMERICAN REVIEW. The author, who is a close student in American history, presents some most surprising facts in connection with past Presidential elections, and looks upon the forthcoming contest for the Presidency as destined to be one of unusual interest and uncertainty.

THE Lincoln paper in the May MCCLURE'S contains some very interesting unpublished letters and anecdotes, showing Lincoln's rare tact and sagacity as a political manager even as a young man. It also describes Lincoln's life in Washington as a member of Congress in 1847–1849, and reproduces from the newspapers in which it was reported at the time an important but now unknown speech of Lincoln's made in New England in 1848. A number of rare pictures appear with the paper.

THE attitude of Mr. Gladstone toward America during the Civil War is strikingly shown in his correspondence with the late Cyrus W. Field, extracts from which are published in the May number of HARPER'S MAGAZINE, including a letter from Mr. Gladstone, written November 27, 1862, in which he expresses his conviction that the Union cause will fail, and that to prolong such a war was "not folly only, but guilt to boot."

THREE striking contributions to the May ATLANTIC are the opening number of a series of letters from Dante Gabriel Rossetti to William Allingham, ably edited by George Birkbeck Hill, with a delightful autobiographical sketch of Allingham; Kendric Charles Babcock's discussion of The Scandinavian Contingent, being the third paper in the series on race characteristics in American life, and an anonymous paper on Mr. Olney's fitness for the Presidency.

TIMELY interest attaches to the Alaska Boundary Question, which the United States Government will soon have to face, and which is the subject of an article appearing in THE CENTURY for May, setting forth in detail the present condition of the controversy, if controversy it may yet be called. The writer, Miss E. R. Scidmore, states that the change of the boundary line in accordance with the Canadian claims would put into British territory not only Mt. St. Elias, but the Great Muir and Davidson glaciers, the canneries at the head of Lynn Canal, and other valuable possessions.

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THE editorial pages of the REVIEW OF REVIEWS for May are especially strong in their treatment of current foreign affairs and international topics. The Cuban war and its relations to Spanish politics, the boundary difficulty between Brazil and French Guiana, other South American matters, the present status of Canadian politics, American policy toward Turkey, the Soudan expedition, England's position among the Powers with reference to Egypt, the British alliance with Italy, Russian interest in Abyssinia, the rising in Matabeleland, and the Budapest Exposition are subjects which fall within the month's survey, and which are intelligently discussed in the REVIEW'S department of "The Progress of the World."

THE BOSTONIAN for May, at its reduced price of ten cents, is the most interesting issue that has yet appeared. The frontispiece is a portrait of Mrs. Julia Ward Howe, President of the Massachusetts State Federation of Women's Clubs, a woman well-known and intimately associated with the club movement from its start. The article itself on the "State Federation of Women's Clubs," from the pen of Mrs. Abby Morton Diaz, is an exhaustive and complete sketch. It is profusely illustrated throughout by the portraits of the various club presidents, and is certain to become valuable to every club woman as a work of reference. Another excellent and timely article is the one on the "Salvation Army and the Volunteers." Numerous half-tone portraits are given of the leaders of this movement. Two other papers that are of interest are the ones on "The Recent Cuban Insurrection," and the "Home Surroundings of Ex-President Harrison and his New Bride," both of which are profusely illustrated throughout. Still another remarkable number in the list of contents is the third paper on "Our Coast Defence," by Lieut. James A. Frye.

BOOK NOTICES.

LAW.

A TREATISE ON THE LAW OF GARNISHMENT. Embracing Substantive Principles, Procedure and Practice, and Garnishment as a Defense; also Conflict of Laws and Foreign and Domestic Exemption Statutes as affecting or affected by Garnishment Proceedings. Adapted to general use. By JOHN R. ROOD. West Publishing Co., St. Paul, Minn., 1896. Law sheep.

In this treatise Mr. Rood gives a succinct, but at the same time clear statement of the laws governing garnishee process. As a ready reference book upon the subject it appears to fully meet the needs of the practicing lawyer.

THE AMERICAN STATE REPORTS, Vol. XLVII. The Bancroft-Whitney Co., San Francisco, 1896. Law sheep. $4.00.

We cannot add to the praise we have heartily bestowed upon this series in the past. Suffice it to say that this last volume is fully up to the high standard of those which have preceded it.

HAND-BOOK ON THE LAW OF BAILMENTS AND CARRIERS. By WILLIAM B. HALE, LL.B. West Publishing Co., St. Paul, Minn. Law sheep. $3.75.

The principles of the law of bailments are fully and clearly stated by Mr. Hale, and this hand-book is in every way well adapted to the student's needs. "The Horn-book Series" (of which this volume is the latest issue) is growing in favor, and deservedly so.

A TREATISE ON THE LAW PERTAINING TO CORPORATE FINANCE, including the Financial Operations and Arrangements of Public and Private Corporations as determined by the Courts and Statutes of the United States and England. By WILLIAM A. REID of the New York Bar. H. B. Parsons, Albany, N. Y., 1896. Two vols. Law sheep. $12.00 *net.*

This work covers a very important branch of Corporation Law. The powers of corporations to incur pecuniary liabilities, and all questions arising as a result of financial operations, are exhaustively discussed. All having aught to do with the management of corporations either as officials or attorneys will find the work of great value. Over 10,000 citations are included.

A TREATISE ON THE LAW OF EMPLOYERS' LIABILITY ACTS. By CONRAD RENO, LL.B. Houghton, Mifflin & Co., Boston and New York, 1896. Law sheep. $5.00 *net.*

We welcome Mr. Reno's treatise, for, as he aptly observes, "the present stage of development and practical importance of the Employers' Liability Acts seems to warrant the publication of an American work upon the subject." The work has been carefully prepared, and the practicing lawyer will find it of great value in the preparation for trials of all suits arising between employers and employees. A chapter is devoted to the liabilities peculiarly affecting railroads and railroad employers, and very full citations of American and English cases arising under the various statutes extending the liability of employers for personal injuries to their employees.

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THE FRENCH LAW OF MARRIAGE, Marriage Contracts and Divorce, and the Conflict of Laws arising therefrom, being a second edition of "Kelley's French Law of Marriage," revised and enlarged by OLIVER E. BODINGTON, B.A., of the Inner Temple, Barrister-at-Law. Baker, Voorhis & Co., New York, 1895. Law sheep. $3.50 *net.*

This book is a very able and exhaustive examination of the law regulating marriage in France, supplying a great amount of information, and illustrated by the opinions and decisions of the most eminent jurists.

In the present edition the chapter on Divorce has been enlarged by a review of the decisions rendered since the promulgation of the Law of 1884, which being almost contemporaneous with the publication of the first edition, was then too recent to admit of a practical commentary. A chapter has also been written upon the Procedure of Divorce, as established by the Law of 1886.

The various systems of Marriage Contract have also been classified, and an outline of the distinguishing features of each *régime* given.

The text and translation of the new Articles imported into the Code by the Divorce Laws of 1884 and 1886, as well as those relating to the various systems of *Contrat de Mariage*, have been added; and the original text has been generally revised and brought into harmony with existing legislation and decisions.

MISCELLANEOUS.

PIRATE GOLD. By F. J. STIMSON (J. S. of Dale). Houghton, Mifflin & Co., Boston and New York, 1896. Cloth. $1.25.

Mr. Stimson has written an exceedingly interesting story concerning a bag of gold left under peculiar circumstances with a banking house in Boston in 1829. The incidents are dramatic, the characters well drawn, and the author enlists the reader's interest to the very end.

LIFE AND SPEECHES OF THOMAS CORWIN, Orator, Lawyer and Statesman. Edited by JOSIAH MORROW. W. H. Anderson & Co., Cincinnati, 1896. Cloth. $3.50.

A generation back no name was better known throughout the land than that of "Tom Corwin." He was undoubtedly the greatest popular orator of his time; he had a national reputation as a wit, and as a lawyer he had few equals. The story of his life should be an inspiration to American youth, for if ever there was a self-made man, Thomas Corwin was one. Mr. Morrow gives many interesting reminiscences, and the collection of speeches includes the most famous of Mr. Corwin's utterances. The book cannot fail to interest every reader.

LUCIUS Q. C. LAMAR, His Life, Times and Speeches, 1825–1893. By EDWARD MAYES, LL.D., Ex-Chancellor of the University of Mississippi. Cloth. $5.00.

Mr. Mayes pays a well deserved tribute to the late Justice Lamar, and while the sketch is evidently the work of a personal friend, there is nothing partisan in the presentation of the facts which made up the life of this great character. Lamar was so conspicuous a personage in national events of the last half century, that the story of his life makes a valuable contribution to the history of the events preceding and succeeding our Civil War. The book is delightfully written, and the speeches selected are all interesting and valuable.

TOM GROGAN. By F. HOPKINSON SMITH. With illustrations by CHARLES S. REINHART. Houghton, Mifflin & Co., Boston and New York, 1896. Cloth. $1.50.

Mr. Smith has an enviable reputation as a story teller, and to our mind nothing that has come from his pen is better than this story of Tom Grogan. The heroine ("Tom") is one whose acquaintance it is a delight to make. The story abounds with stirring scenes and incidents, and is of absorbing interest.

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Thos Addis Emmet

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The Green Bag.

VOL. VIII. NO. 7. BOSTON. JULY, 1896.

THOMAS ADDIS EMMET.

BY A. OAKEY HALL.

"Dear son of memory, great heir of fame,
What need'st thou such weak witness of thy name?"
— *Milton's Epitaph on Shakespeare.*

THERE was an Irish lawyer who took the place at the New York Bar left vacant by the untimely death of Alexander Hamilton, who like him was an emigré from British dominions. His name was Thomas Addis Emmet, whose face and virtues are commemorated on a white marble shaft that faces every pedestrian who passes St. Paul's church on lower Broadway in New York City. The tradition of its Bar and its law reports during the first quarter of this century keep his legal memory green. Considered as a mere man, the name of Thomas Addis Emmet is one for Irishmen everywhere to conjure with as having been a martyr to their revolutionary animosity toward Great Britain.

He was born in Cork, Ireland, twelve years before America's Magna Charta, the Declaration of Independence, was promulgated. His parents were of the first class of Irish commoners, his father being a physician of eminence; and Thomas was younger brother of the Robert Emmet whose first and also last speech in court has been read and re-read by every lawyer, and whose memory lives in song, under the shining light of Thomas Moore's Irish Melodies. Thomas Addis Emmet was educated by his sire to follow in his own professional footsteps, and having that end in view, passed through Trinity College, Dublin, and in time received his degree of M.D.; but participation in a debating society turned his sympathies toward the Irish Bar, and in more good time he joined it as a barrister of fine promise. A valuable opening career attended his maiden efforts, when it was interrupted by his soon joining the United Irishmen, who as a society had organized to combat the rising English feeling toward a Union, and a dissolution of Ireland's national parliament. He and his brother Robert collaborated in patriotic writings and perhaps rash undertakings which the English government called treason. Together they crossed to the Continent in hopes of enlisting foreign aid, and at Brussels the younger brother saw his elder depart to engage in Irish rebellion, and to meet with unexampled courage a fate which, but for the Muses of History, might have been termed ignominious. Thomas Addis also followed his brother Robert to Ireland, himself only to be arrested for treason, and imprisoned in Scotland, and in that Kilmainham jail made also famous in later times by the cells of O'Connell and Parnell. But as the Irish chroniclers of that day have said, the English government remained satisfied with the death of one Emmet, and so gave Thomas and his wife — who had shared his imprisonment — their freedom, on condition that they left their native country never to return to it. They exiled themselves first to Paris, and next to New York, where they were received with open arms by its governor,

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George Clinton, himself of the strongest Irish sympathies because of Irish birth, and an adversary of King George during revolutionary times.

Emmet arrived at New York City in the year of Hamilton's decease, and was after only a short pupilage admitted and welcomed to its Bar. He succeeded from the start, for he was well grounded in the principles of the common law, and being a medical jurisprudent, found his learning as a physician additionally serviceable. He was magnetic in manner, of polished behavior, and a florid and impassioned orator without sacrificing logic. His hobby as a college student had been mathematics, and as every lawyer knows, he who is master of Euclid and differential calculus readily grasps the skill of syllogisms and enthymeme, and can demonstrate legal problems with persuasive effect to court or jury.

Although Governor George Clinton had given warm welcome to Thomas Addis Emmet, and by his influence tided him over the quicksands of Bar-admission, there were several leading members of it who stood aloof from "the interloper," and who, to put it in plain English, showed jealousy of him. It was, too, the era of the Adams alien legislation, and politics had some hand in the feeble attempt to put Emmet into Coventry. But Cadwallader D. Colden, one of Governor Clinton's allies, who had been mayor of the city, and who led in its society, took Emmet by the hand, and being a Bar leader, became of great value to the Irish barrister.

As appears from page 386 of 2 Carnes, New York Reports, objection was expressly made to Emmet's admission, which took place at the February term of the Supreme Court, 1805, on the ground of his alienage, and the discussion resulting in the Court's exercising its discretion was accentuated by the adoption of a rule at an ensuing term requiring citizenship in admission to the Bar (1 Johnson's Reports, 528).

The first reported case in which Mr. Emmet appeared is that of Mumford *v.* McPherson, 1 Johnson, 414, in which he successfully defended on appeal a nonsuit that he had obtained at nisi prius on the point that a plaintiff, suing upon a verbal warranty that the ship which he sold was copperfastened, could not maintain his declaration after a bill of sale had been offered in evidence that was silent as to warranty. His brief is given, in which he cites memorable English cases on the subject of the relation of parol contracts to those put in writing. This relation is so well settled now-a-days that a reading of the old case cited sounds oddly. Emmet cited cases from Yelverton and Peake, stating that verbal and written warranty could not coalesce. It seems that the case was subsequently cited in twelve different decisions in many States.

In the next volume of Johnson, in Welsh *v.* Hill, p. 100, Mr. Emmet argues for, and obtains the discharge of his defendant client because of flaws in the bail piece. At page 104 of the same volume (People *v.* Van Blarcom) he brings his experience in British pauper lore to bear in charging a town with maintenance in its poorhouse which it claimed appertained to another town, and his ingenious distinctions as to statutes seemed to have puzzlingly invited the Court's attention — James Kent being presiding justice. In Pintard *v.* Ross, p. 186, Mr. Emmet brought an old practitioner to book, in correcting and taking advantage of his blunders in procedure. This case must have brought him good advertisement, for his client, John Pintard, was one of New York's most eminent citizens in his day. That clientele also showed that his learning and ability both at nisi prius and in banco were appreciated by the highest class of litigants. In Smith *v.* Elder, 3 Johnson, p. 105, he seems to have been retained because of his knowledge of foreign and international law — the action being with respect to contraband of war on ship-board; and

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his experience seems to have won this contention against odds. But his greatest *coup* as a counsellor of only a few years' standing came in the star case of a suit by Morgan Lewis, governor of the State, against Editor Few of the *American Citizen* newspaper for libel. Emmet's brief is published at full length (5 Johnson,), and it bristles with logic, distinguishment of principles, and with apt citations. The libel is set forth at length, and is a curiosity in its mildness of political comment on a public official as compared with the editorial strictures that newspaper readers of to-day are familiar with. He was ingenious, but was beaten by the Court. In Dubois *v.* Phillips, same volume, p. 104, there cropped up common law practice in respect to procedures on which rules were silent. Here Emmet's knowledge of King's Bench practice proved valuable, and in succeeding through his learning the argument must have enhanced his reputation. Another star case gave him renewed advertisement — Yates *v.* Lansing, 6 Johnson, 335 — Emmet for the plaintiff, who was an Albany lawyer of high standing, and a master in Chancery. He by misapprehension of due authority had subscribed to a chancery bill the name of another solicitor who disavowed the act. Chancellor Livingston committed Yates for malpractice, but Judge Ambrose Spencer discharged him on habeas corpus. This the chancellor declared invalid, and had Yates rearrested and recommitted. The poor sheriff found himself between two masters, and this conflict of the Courts attracted attention both among lawyers and laymen.

At this stage of the conflict Yates retained Emmet, who took his client before Chief-Justice Kent on another habeas; but the latter, as if by prescience that shortly he would be rowing a chancellor's boat, stood by Lansing, and Emmet failed in his action, yet stuck to his procedure, like a disciple of the famous Brougham doctrine in the Queen Caroline case about the fealty of lawyer to client, and so carried his contention into the Court for Correction of Errors, where he succeeded. Then Emmet, for Yates, sued the Chancellor to recover the penalty affixed to the statute forbidding a re-imprisonment of any one once discharged on any habeas corpus for the old offence. But Emmet failed, the Court deciding — and the decision has become for the doctrine a leading case — that superior tribunals of general jurisdiction were not liable to personally answer for acts done in a judicial capacity, nor for errors of judgment. The case is, as finally decided by the Court for the Correction of Errors, to be found in 9 Johnson, 395, and as a matter of legal curiosity is worth reading in connection with their first decision just mentioned, reported in 6 Johnson, because virtually, in deciding for the Chancellor, the Court overruled its first determination against his power.

Thomas Addis Emmet's appearance in court was rather that of a rollicking middle-aged Irish squire, fond of the hunt and the bottle — although he was a model of sobriety. He had roguish Hibernian eyes, a very florid complexion, was of sound physical make, displayed an expansive head, and one that an enthusiastic phrenologist would have revelled to manipulate in a search for bumps; and he used a musical, expressive and variable voice, pleasantly tinctured with a winning Corkonian brogue. He was persuasive and convincing, rather than strictly eloquent, but eminently graceful in gesture and pose. He had but one odd foible, which was in taking a goose-quill pen — his was not the era of the steel, the gold, or the capricious fountain pen — between his fingers, then putting his hands behind him, would reduce the quill and feather to shreds with nervous clutchings, while to the observer in front of him he appeared cool, collected, and talking to point and purpose. He was gifted with great nervous

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energy and mental control. When his argument ended, jurors or judges or adversary would seem to notice what immense force remained; the engine had easily performed its work, but there was power remaining for any further onward movement.

On August 12, 1812, he was gazetted by governor and council as Attorney-General of the State. In six years after coming to the bar, friendless and against jealous opposition, Mr. Emmet had won the highest professional prize. He proved to be an able officer and reliable counsel to the State. In managing a murder case wherein great knowledge of toxicology became necessary, inasmuch as the means used for the crime were by poison, his medical knowledge proved of especial service. But the salary of the Attorney-General was small, and the duties confining. He was obliged to be much of the time at the State capital, while dwelling in New York City. His practice had grown to net him ten thousand dollars a year — a snug income then, for it was not the era of large corporations and trusts full of business and munificent with fees. After, therefore, not quite two years of official life, he resigned, and fully returned to private practice. How extended this was throughout the next decade abundantly appears from the later Johnson Reports and the earlier ones of Wendell.

The United States Supreme Court reports also show that he was retained in it for many memorable cases. The most memorable one was the leading constitutional controversy of Gibbons *v.* Ogden, 9 Wheaton, page 1, which is regarded in our national jurisprudence as a milestone on the highway of constitutional lore. Respondent Ogden had been an assignee of Robert Fulton's steam plant, and of an exclusive privilege by act of the New York legislature of navigating the waters appertaining to the Hudson River and to those portions of the bays around the lower harbor which were in the jurisdiction of New York State. Appellant Gibbons had in the State courts sought an injunction against Ogden's assertion of his exclusive navigation privileges from the State — that he denominated an unconstitutional monopoly. And in support of his right to conduct a steam ferry through New York waters to a point in New Jersey, he set up a United States navigating license to himself under due Federal statutory authority. The State courts, in giving to Ogden — Robert Fulton's assignee — the full benefit of his legislatively awarded monopoly, brought Gibbons as appellant to the Washington court. The conflict between state rights and a paramount Federal jurisdiction of navigable waters produced widespread interest. Newspaper and legal gossip divided in opinion. But the larger number of disputants viewed with alarm any monopoly of the then new but rapidly growing transit by steamboat. In the February term of 1824 the controversy reached the tribunal over which the great John Marshall presided, and of which Joseph Story was a junior member in company with Smith Thompson of New York, whose commission was then only a year old. Their elder associates were Bushrod Washington of Virginia, who held commission from the administration of his great namesake; William Johnson of South Carolina, Thomas Todd of Kentucky, and Gabriel Duval of Maryland — all of whom had been law students when the Federal Constitution went first on trial. Gibbons had retained Daniel Webster and William Wirt, and the legal rank of Thomas Addis Emmet at that time may be well estimated, when the State of New York, whose legislative rights were in question by the controversy, retained him against those eminent jurists as aid to the private counsel of Ogden, who was the afterward eminent Chief-Justice Thomas J. Oakley of New York City. There was an immense audience of congressmen, lawyers and laymen

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assembled when the four eminent counsel took seats, after all below the Bench had in standing greeted the full Bench, for the popular interest in the great legal battle had then become climacteric. The scene when the argument opened would have formed on canvas a rare historical picture, with the strong Washingtonian countenance of Chief-Justice Marshall in the foreground, and with the eagle-eyed Webster, whose laurels of the great Dartmouth College case still adorned his Jove-like forehead; with the handsome and graceful Attorney-General Wirt, wearing literary honors as author of "The British Spy," and the biography of Patrick Henry, and also professional fame first won in the Burr treason trial; with Thomas J. Oakley, a facial combination of hawk and owl; and with the Milesian bearing of Emmet, all as middle figures in the picture. The report of the argument and of the opinions of Marshall and Johnson, that begin the ninth volume of Wheaton's Reports, constitutes the longest entry on the reports of the Court up to that date, and spreads over a score of pages. Mr. Webster's argument is a marvel of arrangement, and constitutes a very ladder of logic, each round leading to the next, until these finally reach an apex of eloquent defense of the Federal Constitution as possessing supreme jurisdiction over the navigable waters and commerce of the United States. It was not ornate, he was leaving that to Wirt, but he held up his client's license to traverse Federal waters as the paramount factor in the controversy. Oakley followed with plausible pleas for coincidence of State sovereignty with Federal safeguards. Emmet succeeded him, leaving Wirt to answer their joint argument. Emmet's address, after a reader has grasped Webster's exposition of the controlling power of the Federal Constitution, reads speciously, but the reader cannot fail to extol its admirable rhetoric and classic style. It will impress the student as even more ornate than the closing argument of Wirt, which aimed to shade logic with style. The episodes and the closing paragraphs in the arguments of each combatant glow with fancy and illustration.

Webster's constitutional views won upon Marshall's massive intellect, and he delivered an opinion that has long been monumental in jurisprudential regions, holding with Justice Johnson, who also prepared an opinion that is only a foil to that one by the Chief Justice. The Court decided that the grant by the New York legislature was unconstitutional and void, and that Gibbons, the appellant, had by virtue of his Federal license, and by the operation of the Federal Constitution, the freest right to navigate the New York and all other waters. The opinion was the first strong national blow judicially delivered at the potency of States, rights when in conflict with Federal authority.

Although unsuccessful, Mr. Emmet's legal prestige was improved, and for three years longer he maintained supremacy at the Washington and Eastern bars. In the autumn of 1827 his fee-book showed him in receipt of the annual income of fifteen thousand dollars, equivalent in purchasing power to double that amount now-a-days.

On November 12 of that year he entered a New York court-room apparently in full health and spirits, to conduct a trial, but suddenly his transcribing pen fell from his hand, for — as an eloquent medical lecturer once observed to his students — "beside every worker with his brain walks in close company an unseen spirit armed with a javelin, ready at any moment to strike, and the popular name of that attendant spirit is 'apoplexy.'" The metaphorical stroke reached Emmet, while Court, Bar and auditors became absorbed in the most anxious interest for the fate of the eminent citizen with seven years of the Biblical span of life yet spared to him; but on the following night he expired. The notes of testimony which

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he had taken on the fatal day are yet preserved by one of his descendants who followed his great-grandfather's profession. These were a full and accurate transcript of what had occurred up to the moment when the fatal clot invaded his perhaps too active brain. Thus he literally died in harness, after having on the Sunday previous ejaculated the supplication in the litany service, "From battle, murder and sudden death, good Lord, deliver us."

Mr. Emmet was remarkable for display of courtesy to Bench and Bar, and slow to anger. On one occasion early in his career, he and William Pinckney were opponents in the Supreme Court at Washington in a case that the latter had greatly at heart, and Mr. Pinckney appears to have traveled out of the merits to indulge in personal references to his opponent, with a view perhaps — as are often forensic tactics — of irritating and weakening reply. The incident, however, seemed to have operated as a hone for sharpening his intellect without ruffling his temper. When the argument ended he said to the Court, "Perhaps I ought to notice the remarks of the opposite counsel, but they belonged to a species of warfare in which I have had the good fortune to have found no experience. I am willing to leave my adversary whatever advantage he may gain from display of his talent in that direction. When I came to this country I came as a friendless stranger, but I am proud to say that from the Bar generally, and from the Bench universally I have experienced nothing but politeness and even kindness. I have been accustomed to admire and even reverence the learning and eloquence of the gentleman, and he was the last man from whom I should have expected personal observations of the kind in question. The learned gentleman had once filled the highest office his country could bestow at the Court of St. James — as a subject of which I was born — but I am sure he did not acquire his breeding in that school." Court and Bar looked delighted, for William Pinckney's manner was often overbearing. But in Wheaton's life of Pinckney appears a report of the apology that the latter immediately tendered, viz.: "The manner of the gentleman in reply reproaches me by its forbearance and urbanity, and hastens the repentance which reflection would have produced. I offer him a cheerful atonement. Cheerful because it puts me to rights with myself, and because tendered to an interesting stranger whom adversity has tried, and affliction" (evidently referring to the execution of his brother Robert) "struck severely to the heart; to an exile whom any country might be proud to receive, and every man of generous temper would be ashamed to offend." Perhaps at this atonement Mr. Emmet may have felt what Frederick R. Coudert expressed when, having been roughly treated by an adversary's speech, and the latter having regretfully apologized, Mr. Coudert observed, "I now rejoice at the incident because of the charming recompense."

The following traditional anecdote is of record in the annals of the New York Bar, illustrative of the craft and shrewdness of Mr. Emmet as a counselor. The transaction to which it refers having been bruited about publicly at the time, gave him much popular fame. A journeyman sadler of the city, having accumulated a few hundred dollars, purposed to establish himself in a suburban village, and while at its inn entrusted its landlord with the keeping over night of two hundred dollars. This, on demand the next morning the rogue denied having received. The guest had not taken a receipt, nor was it the time when a suitor could witness for himself, and Mr. Emmet was obliged to inform him that he had been tricked without recourse, "but," added he, "if you have another two hundred, return and tell him you must have been mistaken, and apologetically, taking a friend with you as a witness, deposit another two hundred

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with him"; which the client did. "Now," said Emmet, a day or two after, "go and claim the two hundred dollars while alone, and he will give it to you." And so it proved, and the bewildered client returned with it to ask how he was better off. Then Emmet added, "To-morrow go to the innkeeper with your witness friend and say, "Having returned me my first two hundred dollars I come now for the second two hundred."

The rogue of course on another visit denied its reception, but the witness spoke up and said, "I saw the transaction, and will bear testimony in court." The village Boniface, fearing for the reputation of his house if suit was brought, and exposure resulted, paid over the money, and realized how he had been beaten. Then the client returned exultingly to Emmet, who refused a fee. And the saddler and his witness friend were not chary in telling to everybody what a shrewd man was the Irish rebel lawyer from the old country.

When Thomas Addis Emmet was the so-called Irish rebel, he had in his native country two compatriots who also emigrated to New York — William Sampson, a Dublin barrister, who became the John Philpot Curran in wit and repartee of its Bar, and Dr. MacNevin, who became an eminent physician in his new home. Emmet and McNevin each have a commemorative shaft on opposite sides of St. Paul's churchyard. Together when first in New York they collaborated in a published volume containing narratives of Irish scenes.

Emmet's legal excellence was long kept vivid by his son Robert, who won triumphs as a member of the New York Bar, and subsequently as a judge of its Superior Court, that has recently, in company with the Court of Common Pleas, been merged in the Supreme Court of the State, after the plan of Lord Campbell, whereby the London courts of Queen's Bench, Exchequer and Common Pleas were merged into one Supreme Court of Judicature, with several divisions of specialty jurisdiction. A son of Robert still further keeps alive at the New York Bar the legal traditions of the Emmet family; and yet another grandson of Thomas Addis Emmet, and his namesake, embraced the medical profession, which the great Irish exile discarded for the legal. And at this time of writing a great-granddaughter, Rosina Emmet, is attracting, by her marvelous picture entitled "Intermezzo," in the water-color exhibition at the Academy of Design, groups of admiring critics and connoisseurs, who never fail to recall to each other her famous ancestry.

AN ASTRAL PARTNER.

By Hon. Albion W. Tourgée.

IT was in 1876. Our literature had not yet become the dumping ground for all sorts of wild imaginings which are set forth as evidences and exemplifications of preternatural influences, and which culminated in the Blavatsky memoirs. At times something was heard of "spiritual manifestations," as they were termed, and there was occasional speculation as to the power of one mind over another, — what is now called hypnotism. In the latter, as a law of intellectual existence, I have always been a firm believer, because of the many instances which have occurred within my own personal observation and experience. To the former, I have never given credence. That any intellectual or so-called spiritual force could directly control inanimate matter, I have never been able for one to accept as true, though, in the ultimate, it is evident that creation itself must have been the result of such determination of chaotic atoms. That, however, is based on the conception of a Deity, fundamental, supreme, and governed by laws applicable only to Himself. That any other existence, whether incarnate or disembodied, should move inert material matter by an exercise of will or other intangible force, I have always firmly denied. At the same time, considering such speculation unprofitable and enervating in the extreme, I have persistently refrained from effort to solve any of the apparently necromantic riddles put forth by professors of mysterious arts bordering on the preternatural. I fancy I am one not likely to be led away by mere show of mystery, and the event hereafter related, *every incident of which is true*, will, I think, prove me not to be one apt to admit the truth of another man's assumption, simply because I might myself be unable to offer a plausible, demonstrable solution of a given state of facts.

At the time mentioned, I was practicing my profession in a Southern city and occupied one of those one-story offices with a porch in front and a front and back room, which are the ideal of the Southern lawyer's den. It was painted a dark brown, and on one side of the door a modest sign showed in neat gilt letters the legend, "—— ——, Attorney"; nothing more. I have always had a supreme contempt for the long-winded "counsellor at law." Besides that, I had gotten beyond the need of advertisement, and did not require a sign as big as a door to let the public know of my existence. This served for those who were looking for me, and they were sufficiently numerous to keep me busy and yield a reasonable income. One day in midsummer, during the heated term which intervenes between the spring and fall circuits, the colored boy who swept my office and ran errands for me, brought the mail and laid it on my desk. The temperature did not conduce to either physical or mental activity. I was sitting in one of the great splint-bottomed rockers which lend such an air of comfort to Southern houses, a note-book open on one of its broad arms and a lot of law-books ranged about on the floor in easy reach, their red-and-black-banded backs turned upward to save even the trouble of stooping to determine which one was required. Nominally, I was engaged in the study of an important case which had some curious and puzzling aspects, struggling with the consciousness that somehow or other the law ought to be with my client, but meeting in every volume examined the discouraging discovery that hitherto the judges of the various courts seemed to have taken a different view. One after another, I had read the reported cases with much the same feeling a soldier has when scrutinizing the defences of an enemy.

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Each one represented a bastion or redoubt which must be scaled or turned. It was evident that my opponents had immensely the advantage of position; I knew them to be able and adroit, and the chances so remote of either stealing a march upon them or overcoming them by direct assault, that I closed my note-book and betook myself to the drowsy consolation of a long-stemmed pipe, well charged with my favorite brand of nicotine solace. Every lawyer knows this mental condition, and the fact that the only way out of it is to abandon for a time the consideration of the matter in hand, giving his mind an opportunity to rest, in order that he may take up the line of thought with a fresh impulse at some future date.

In this mood I glanced mechanically over the dozen or so letters which constituted the day's mail. None of them were of particular moment until the last. This was from a man residing in a Northern city, whom I knew to be of great wealth and interested in an important suit which had been pending for some years in one of the counties in which I practiced. As I opened the letter, a slip of paper fell into my lap which I found to be a check drawn to my order for a sum that actually took my breath away. This was the purport of the letter, if not the exact words: —

——— ———, Esq.

Dear Sir:

Enclosed please find check for —— dollars, as retainer in Morris *vs.* Cooper Hill Mining Company, now pending in Earl County of your State, of which case I desire you to take entire charge and control.

Respectfully,

NEWLAND MORRIS.

The letter was even more surprising than the check. I knew that able and distinguished counsel, some of whom were vastly my superiors in ability, already represented the plaintiff in this action. The cause involved the title of a tract of mining land supposed to be of great value. That I should enter the case and assume control at the present stage in its progress was not to be contemplated for a moment, even with the temptation of the honorarium enclosed. So, not without a struggle, I wrote to Mr. Morris, calling his attention to these facts and returned the check endorsed to the order of its drawer. This transaction had a very depressing effect upon me. My practice was a fair one, but checks of such amount were not so frequent in it as to prevent their being rarities. I wandered about for several days mentally kicking myself for what I had done. At the end of that time I received another letter, enclosing a duplicate of the former check, informing me that all the attorneys previously engaged in the case had been paid off and discharged, not from any distrust of their faithfulness or ability, but for a reason which would be explained when we met.

Upon inquiry, I learned this to be true; that each of them had received an entirely satisfactory douceur, and, at the request of their client, had filed a formal withdrawal from the case. I learned, also, that they did so with all the more readiness, because they were privately of the opinion that the plaintiff's case, though it rested on a state of facts which might be true, was not, as they conceived, susceptible of proof. Thereupon I disclosed the fact of my retainer and received the congratulations of my brethren on having secured a good fee, — the amount of which, of course, I kept secret, — and their condolences for having engaged in what they considered a hopeless cause. But I had the check to console me for prospective humiliation, and sending to the clerk of the court for the papers in the case, was fully informed as to its character before the time set for the Fall Term arrived. After careful examination, however, I was inclined to agree with my predecessors, though a possible way to avoid defeat presented itself.

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The action was based on an averment of the fraudulent character of a sale made under execution, during the War of the Rebellion, when intercourse between the North and South was interrupted. The agent of Morris — or rather of the party from whom he afterwards purchased the property, which was transferred to him by quit-claim — had been vested with the title, as his own letters showed, merely to prevent confiscation by the Confederate government, as the property of an alien enemy, the real owner being a Northern firm known as Hook, Frazee & Co. This conveyance had been set aside by the courts of the Confederacy as fraudulent, on the confession of Williams, the agent, himself, and a decree of condemnation was about to be entered when a third party — who afterwards aliened to the Cooper Hill Mining Company, the present defendant — intervened with a claim of previous and better title. This title was based on a judgment rendered by a justice of the peace against Hook & Co., for a small sum due on account. The judgment had been certified to the county court, and an order to levy on land obtained, under which order there had been a sale to the alienee of the defendant, previous to the beginning of the proceedings for condemnation. On the production of this evidence the confiscation proceedings were discontinued and the purchaser under the execution, by himself and his assigns, had been in peaceable possession until the beginning of the present action.

My client's action was based upon the hypothesis that this sale under execution was procured by collusion between Williams, the agent of Hook & Co., the former owners, and Azariah Cooper; the purpose on the part of Williams being to protect his principals and prevent the loss of the property by confiscation. This hypothesis had a strong show of probability, but was difficult to establish, since the agent, Williams, had died during the progress of the war and left no written memorandum of the transaction as far as we had been able to discover. The other party, finding himself in possession of a valuable property, had not been slow to appreciate the advantages of his position and stoutly insisted upon his right to hold it. The only hope of evidence to set aside the transfer lay in the testimony of one Garner, who had been a clerk at the mine and was supposed to have heard declarations of Williams in regard to the matter, and to be able to show that the agent had funds of his principals in hand amply sufficient to discharge the judgment on which the defendant's title rested. Thus far Garner had refused to make any statement, and his employment, after the present action was begun, by the defendant as bookkeeper at the mine, gave little hope that his testimony would be favorable to my client. However, there were scraps of evidence supporting our claim, and I had considerable confidence in my capacity as a cross-examiner to impair the testimony of Cooper, who, it was certain, would have to testify in support of the proceeding under which he claimed title.

Affairs were in this condition when, the week before the Fall Term of the court, Mr. Morris came south at my suggestion to confer in regard to the trial. There had been a rupture between the defendant corporation and Garner, and he had been to see me, uttering vague threats as to what he might be able to do, but making no definite statement as to the nature of his testimony. Without offering him pecuniary inducement, I had dwelt on my client's wealth and well-known liberality and Cooper's niggardliness, in the hope of widening the breach and inclining Garner to tell what I firmly believed to be the truth in regard to the sale of this valuable property for a debt of less than two hundred dollars. I thought he was in a hopeful condition, and that it was our policy to force a trial before the Cooper Hill people could come to terms with him. This information, I, of course, communicated to

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my client at our first meeting, and was surprised at a certain lack of responsiveness on his part, which seemed out of character with so positive a man and so keen a litigant as I had reason to believe him to be.

"I don't know," he said, doubtfully and with a certain reserve for which I could not account, "whether we can try at this term or not. To tell the truth, it depends on matters not within my control and as to which I am not yet informed."

I waited for him to explain further, but as he only sat clasping and unclasping his hands nervously, I said, somewhat coolly no doubt: —

"Well, it is your affair; but I should advise, — strongly advise that we press for trial. If you wish to continue, I don't fancy your opponents will object; but I wash my hands of responsibility. If the case is continued and you are beaten by Garner's testimony, don't blame me."

"Not at all, Mr. ——," replied my client. "I appreciate what you have done and my judgment quite coincides with yours; but there are others, — at least another, — in short, Mr. ——, I am not a free moral agent, — not in this matter at least, though I am hardly at liberty to make known to you the real facts of the situation. I trust you will pardon my seeming lack of confidence, or rather perhaps, what you may deem an unaccountable reserve. I hope to be able to speak with entire freedom in regard to the matter, perhaps very soon."

I could not but recognize the sincerity of my client's words and the evident pain his lack of candor caused him. He was clearly worried and undecided, a fact at which I greatly wondered from what I had heard of his character. It was a time of great financial instability, however, and I concluded that his language referred to business difficulties which might culminate in an inability to continue the litigation. So I said, cordially, for I wished to show a sympathy with his distress: —

"O, it is of no consequence, Mr. Morris. Of course one likes to have his judgment regarded in such a matter; but after all a lawyer is only his client's agent, and whatever you may determine to be for your interest, that I shall most cheerfully do."

Was I mistaken? There certainly was a quiver of the lip. He took out his handkerchief, pressed it to his face, rose, walked across the room and stood for a while looking out of the window. After a time, he returned and extending his hand, said with a most engaging smile: —

"I thank you, Mr. ——, for yielding so considerately to what must seem a mere whim on my part. Perhaps when you know the real cause, you will even think it puerile; but I must beg you to believe that to me it is a matter of serious moment."

He shook my hand and started to leave the office. "I hope to see you again before night if you are at leisure," he said, looking back from the open doorway.

He walked across the porch, down the step to the sidewalk, and calling his son, a young man of seventeen or thereabout, who had gone out into the street during our conversation, took his arm in a most gentle fashion and strolled toward his hotel. My client was a man of fifty odd years of age; of medium height; a little inclined to portliness, full rather than fleshy; having a short neck set squarely on his shoulders; a broad, firm chin, a wide mouth with thin, finely-cut lips; a smooth face save for a brown moustache just beginning to be sprinkled with gray; large brown eyes and a dome-like head, the hair on which was growing scant on top, but was yet curling and abundant at the sides. Save for an expression of softness, almost melancholy, his appearance fully sustained the character he bore of a careful business man and daring speculator "on change." I could imagine one of his type coolly taking risks which would terrify other men; and believe what I heard of his placid demeanor in times of

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financial panic. Yet there seemed to be another side to his character. His hands were soft and white as those of a lady, moist and tremulous too, when they touched mine. His manner was courteous and deferential to a notable degree, and he was dressed with almost painful neatness. I wondered as he walked away holding the arm of the slender youth, where the two sides of his character met, and by what jointure they were united.

I had not long to wait for the solution of the enigma. Hardly had an hour elapsed when Mr. Morris returned utterly transformed, — his face beaming, his manner confident, his tones cheerful and decided.

"I can tell you all about it now," he said, heartily. "We will not try at this term. You can see Waring and arrange a continuance. We would like to start back in the morning."

"You have had a telegram then, and I judge, good news?"

"Yes and no," he answered with a laugh as he sank back into a chair and wiped his glowing face. I have had news, but no telegram; but the communication was of a sort that always makes me happy. If you will allow me to close the door so that we shall not be interrupted, I will tell you all about it."

He shut the door, and sitting down in the chair opposite me, said: —

"I suppose, Mr. ——, that what I am about to say will half incline you to the belief that you have a lunatic for a client, but I beg to assure you that I am in my right mind, and have no doubt that the result will justify the decision I have announced. My life since I left college has been wholly devoted to two things, my family and my business. I put the family first, because it really occupied the greater share of my thought. However, I liked the risk and excitement of business life, and as you know, have been fairly successful. I never carried it home with me, and my wife, a frail, delicate woman, knew no more of that side of my nature than the speculators on "change" knew of my home. I had some losses, now and then, but no real reverses, and when, ten years ago, my wife died, it was my first sorrow. That blow took the sunshine out of my life. When I laid her in Greenwood, and had carved upon her tombstone the words of the old Latin poet —

> 'Illa fuit animae,
> Dimiduum meae,'

it told the simple truth. She was the 'twin of my soul,' or rather the other half. I had not thought that she had been so much to me; or what was left of me would be so purposeless and incoherent without her. We had two children, a girl of sixteen and a boy of seven. I had been as fond of them as most men are of their children, I suppose, but their mother had been the central figure in the home, and without her they did not seem to mean much to me. I left my business and wandered about, not moody or consciously mourning, but simply dazed, purposeless, like one walking in his sleep.

"Out of this condition I was stirred, I might almost say waked, by my daughter Esther, who dragged me back to my business by asking questions and seeking to answer them herself. I soon became interested in her interest, and after a time went back to my old life upon 'the street,' taking her with me; that is, she went at first to be sure that I did not forget myself in the selfish indulgence of retrospect. In a few months she had become enamored of business and showed an amazing aptitude for it.

"This association brought us very close together. She shared my labors and I her joys. Never had I had such success; never had I gone into society so much. Five years this continued. She knew all about my affairs, and I leaned upon her counsel and advice as I never had upon her mother. Lovers sought her, but she manifested no inclination to leave me. I suppose the time

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would have come when she would have felt the need of other associations; but before it arrived, she too had passed beyond, and I was alone again.

"During her illness she had promised with passionate earnestness to communicate with me if such a thing were possible. For months afterwards, especially while at my office, I felt that she was with me, guarding me. At length a friend opened the door between the seen and the unseen worlds, and I received a letter from her.

"You smile at the confession. Perhaps you pity me as the dupe of some designing knave. Let me tell you that the letter was in her own familiar handwriting, and treated of matters known to no human beings but ourselves. Among other things, she advised me to sell a block of stock in which I had the utmost confidence,— indeed, urged their sale that very day. Merely because the request was made in her name, I hastened down town and sold every cent of my holdings, more than a hundred thousand dollars. The next morning the stock fell, and from that day to this it has been going down, with now and then feeble rallies. I had paid a premium for those shares, and sold at a premium greater than their whole value at this time. If I had doubted before, I had no doubt after that. Thenceforth I communicated with her daily; and less frequently with my wife. Being a less positive nature, it is more difficult for her to overcome the obstacles in the way of such intercourse.

"You have no idea of the peace and comfort I have derived from the thought that these two loved ones are near me, watching over me and over my son, whose sensitive and dependent nature seems especially to demand such watchcare. A year or so ago, we learned by mere accident that he was a medium of rare powers. Since that time all our communications have been made through him, and I take no important step in business matters without consulting this silent partner in the unseen world, always following her advice. It no doubt seems absurd to you, but the fact that I have more than doubled my estate, and have made so few mistakes that my luck has passed into a proverb with my associates, will show you that I have at least good reason for my faith. To me, however, this is as nothing to the sense of association which has made my life during this time a constant gleam of sunshine.

"It was my inability to communicate with Esther in regard to the Cooper Hill suit that affected me with hesitation no doubt ridiculous in your eyes. For a week or more all effort to communicate with her had been futile. I was greatly troubled. I felt that I ought not to proceed without her counsel, as she had always taken a great interest in the property, declaring that it would prove the best investment I had ever made. I took it for a debt, you know, and would have sold the claim to Cooper himself, at a very moderate price, if he had not been so arrogant. Esther always insisted that the sale could be set aside as fraudulent, and over and over again has assured me that she would put me in possession of facts that would prove her confidence in the investment to be well-founded. Naturally, her silence made me hesitate.

"Well, we had hardly reached our room after I left your office when Willie felt the peculiar drowsy sensation which indicates that some one is desirous of making a communication. In a few minutes we had a long and interesting letter from Esther. She says we must not try at this term for reasons which she cannot reveal, but hopes we may be able to do so at the next. She not only assented to my telling you this, but requested me to inform you that it was through her suggestion that you were retained, and the other counsel released. I think she would be glad to see you, and if you have no objection, I would like you to accompany me to the hotel and meet her,—

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pardon me, I am so accustomed to think and speak of her as alive and present with us, that for the moment I thought only of introducing you to each other."

There were tears in his eyes, which he brushed quickly away; but his beaming face told me that they were tears of happiness. I had never seen any of the so-called spiritualistic manifestations, and had not the slightest faith or interest in them, but I could not deny anything within reason to this man, who had so freely poured out his heart. So I put on my hat, and we sauntered down under the elms that were just shedding their brown leaves. In his room at the hotel I had the first consultation with my astral associate.

(*To be continued.*)

TO BURNS.

(Died July 21, 1796.)

By John Albert Macy.

IN your ane meter, Robbie, lad,
In English claithed in Scottish plaid
(Though badly claithed, I'm sairly rad)
I sing your fame,
And wad my hilchin verses add
To roose your name.

A hunder year hae gaen awa'
Sin' ye respondit to the ca'
O' Heaven, and gaed the road o' a'
Us mortal folk;
And there was nane on whom could fa'
Your bardie's cloak.

Ye died, dear Rabbie, vera soon,
Before your life had reachit noon;
Yet needless was the mourners' croon,
Yer life was lang,
For ye hae lived the cent'ry roun'
In your sweet sang.

Sometimes the turnin' o' the yirth
Lea'es men behint and dulls their worth,
But we to-day can luve your mirth
And sorrow too.
And sae we dinna feel the dearth
O' men like you.

Some ca' ye bad; I dinna think it:
Had ye a faut, ye weel might sink it
In your soul, deep enow to drink it
And not be muddy,
Mair than the ocean could be inkit
Or fylèd bludie.

Your verses smack o' new turned clods,
O' shepherds real and rustic gods
Wha tread auld Scotia's thistled sods
By river turns,
But maist they savor, by all odds,
O' Rabbie Burns.

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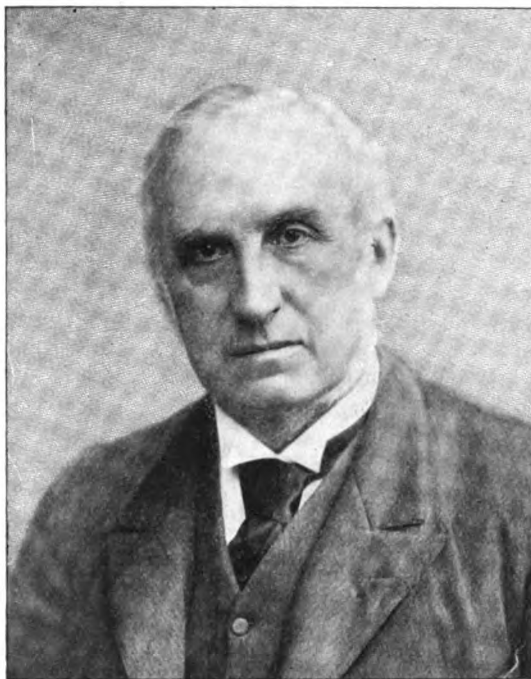
THE ENGLISH LAW COURTS.

V.

THE QUEEN'S BENCH DIVISION.

THE judicial functions of the Anglo-Saxon monarchs were of a twofold nature — the ordinary authority which the King exercised, like the inferior territorial judges, differing perhaps in degree though the same in kind, and resulting from the peculiar and immediate relation of the vassal to his superior; and the prerogative supremacy pervading all the tribunals of the people, and which was to be called into action when they were unable or unwilling to afford redress. (Palgrave, 1 Eng. Common, 282.) With the Norman conquest an important change was effected. The office of King's Chief Justiciar was introduced, and a gradual centralization of judical power was effected by the establishment of the *aula regis*, or supreme council of the sovereign. From this supreme council were derived the Courts of Exchequer, Common Pleas and King's Bench — whose several jurisdictions are now merged in the Queen's Bench Division. These three courts were originally in the nature of committees delegated by the sovereign for the despatch of specific branches of the business of his court, but soon assumed an independent existence. The Court of Exchequer dealt principally with matters relating to the royal revenue; although it afterwards by a legal fiction acquired a jurisdiction in private suits, and had also an equity jurisdiction of its own, which was for the most part abolished and transferred to the Court of Chancery by 5 Vict. c. 5. The Court of Common Pleas had peculiar cognizance of suits between private persons (*communia placita*). It was at first itinerant — (we shall notice this aspect of its history more particularly in dealing with the assizes in a subsequent paper) — in character, but the famous article in Magna Charta, *communia placita non sequantur curiam nostram sed in aliquo loco certo teneantur*, gave it a settled habitation and a name. The *certain place* fixed upon was Westminster. The *aula regis*, already weakened by the definitive establishment of the Courts of Exchequer and Common Pleas, and in the time of Henry III, by the secession of the chancellor, in the time of Edward I had its authority revived by the erection of the Court of King's Bench, "anciently called *curia domini regis* because oftentimes the King sat here in person, and had his justices *a latere suo residentes*" (Dugdale, Orig. Jurid. c. 17, p. 38), a



THE LORD CHIEF JUSTICE OF ENGLAND.

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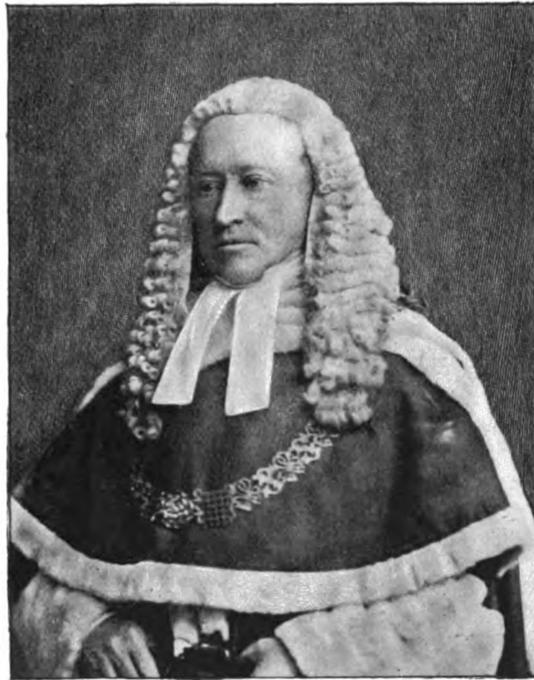
primitive state of matters which did not long exist. The King's Bench possessed a twofold jurisdiction: (1) over all pleas of the crown not relating to revenue, a category which comprised all felonies and misdemeanors, a controlling power over other courts of criminal jurisdiction, and the right to inquire into matters of franchises and liberties or the wrongful usurpation of official functions; and (2) over matters of a private nature involving injuries alleged to have been committed with force, or in which the defendant was charged with falsity or deceit. By an ingenious series of legal fictions, the King's Bench subsequently acquired jurisdiction over all personal actions of a civil nature, and "although by a subsequent statute, 3 Car. II. st. 2, l. 2, this acquired, or rather usurped, jurisdiction of the court had nearly met with a decisive check; yet it was retained by an exercise of ingenuity not inferior to that by which it had in the first instance been assumed." (Broom's Com., — pp. 41, 42.) The statute to which we have referred provided that where a defendant was to be held to bail for more than £40 by virtue of process issuing out of the Court of King's Bench or Common Pleas, *the true cause of action* should be specified in the writ or process. As the jurisdiction of the King's Bench in personal actions was founded on a fictitious allegation of trespass, this statute, unless it had been evaded, would have stripped that tribunal of its usurped authority. But evaded it was, by a most astute device. A plaintiff whose cause of action enabled him to hold the defendant to bail for more than £40, was permitted in the process to command the sheriff to arrest the defendant in order that he might answer the plaintiff in trespass and also (*ac etiam*) for a debt, or whatever the claim might be. This at once gave the court jurisdiction by the fictitious allegation of trespass and complied with the statute, by setting forth the true cause of action in the writ! Under the Judicature Acts, 1873 and 1875, the Courts of Exchequer, Common Pleas and Queen's Bench became branches of the High Court of Justice, under the name of Divisions. But, by Order in Council, dated the 16th of December, 1880, the Common Pleas and Exchequer Divisions were abolished, or rather merged in the Queen's Bench Division, and the powers of their former heads — the Lord Chief Justice of the Common Pleas and the Lord Chief Baron of the Exchequer — passed, under the Judicature Act of 1881, to the Lord Chief-Justice of England. Their puisne judges (who were called Barons in the Court of Exchequer — Barons Huddleston and Pollock were the last of the series) became justices of the Queen's Bench Division. Under the Judicature Act of 1873, the powers of the Court of Exchequer Chamber, which was previously a court of appeal by writ of error



LORD CHIEF JUSTICE COCKBURN.

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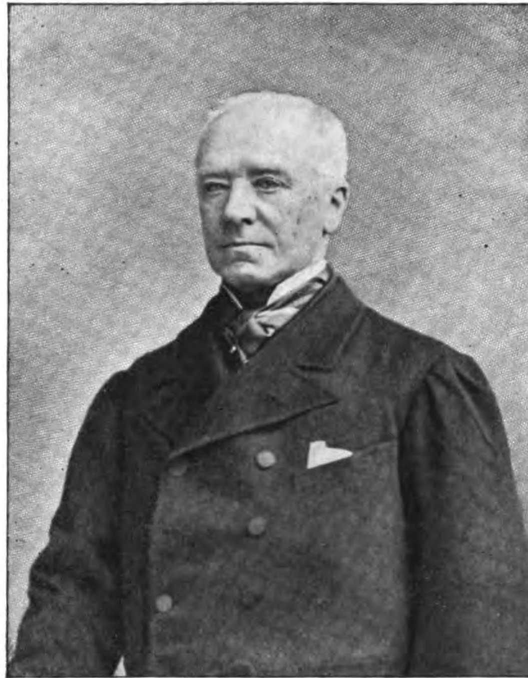
from the Courts of Common Pleas, King's Bench, and Exchequer, were transferred to the Court of Appeal.

The jurisdiction of the Queen's Bench Division is partly first instance and partly appellate. The judges sit in chambers, both to hear appeal from the masters, and to determine cases themselves, turning on points of practice and procedure; appeals from their decisions in these cases are taken direct to the Court of Appeal. Single judges also try, with or without juries, any causes that formerly belonged to the jurisdiction of the Courts of Common Pleas, Exchequer, or King's Bench, subject to an appeal to the Court of Appeal. We shall notice the functions of the Queen's Bench judges in connection with the assizes in a later paper. Two or more judges of the Queen's Bench Division also sit as divisional courts to hear appeals from county courts, and to determine crown and revenue cases.



MR. JUSTICE HAWKINS.

We proceed now to give a series of sketches of some of the more prominent common-law judges.

SIR EDWARD COKE.

Sir Edward Coke was the only son of Robert Coke, a barrister and a bencher of Lincoln's Inn, and he was born at Mileham, in the County of Norfolk, in 1551. He was educated at the grammar school of Norwich, and afterwards at Trinity College, Cambridge, and after enrolling himself and reading, both at Clifford's Inn and at the Inner Temple, he was called to the bar on the 20th of April, 1578. His first brief was held, and held successfully, at the ensuing term, in defense of a clergyman of his native county, a Mr. Denny, against whom an action had been brought by Lord Cromwell for *scandalum magnatum* (4 Rep. 14). He rose at the bar with a rapidity which would nowadays be difficult of attainment, even by a Coke. The year after his call he was chosen by his benchers, reader at Lyons' Inn. In 1582 he married his first wife, Miss Paston, who brought him a fortune of £30,000. In 1585 he became Recorder of Coventry; in 1586 he was made Recorder of Norwich; and in 1591 the corporation of London elected him Recorder of the metropolis. In 1592 he was raised to the solicitor-generalship by Lord Burleigh, and as reader at the Inner Temple delivered his famous lectures on "The Statute of Uses." In 1593 Coke's political career commenced. He was returned to Parliament as member for Norfolk, to use his own language, "nullo contradicente, sine ambitu, seu aliqua requisitione ex parte mea," and held the speakership during the few weeks that the Parliament lasted. In 1594 Coke was made Attorney-General. In 1598 his first wife died, and within six months afterwards Coke married the widow of Sir William Hatton, for whose hand Francis

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Bacon, his great rival, had been a suitor. She made him very unhappy, however; and when one reads the record of his disgraceful conduct in the State Trials, in which he prosecuted as Attorney-General, it is difficult to feel any very acute regret at the fact. One can hardly imagine such language as that in which Coke addressed Sir Walter Raleigh being used by any educated gentleman, or tolerated by the Bench, at any period in English legal history: "Thou art a monster; thou hast an English face, but a Spanish heart!" "Thou viper, for I *thou* thee, thou traitor!" "Thou art thyself a spider of hell," and so on. Coke was scarcely less violent in his behavior on the prosecution of the gunpowder plotters. Soon after that memorable trial (viz., in June, 1606) he had his reward in the chief-justiceship of the Common Pleas — an office which he held with dignity and unexpected impartiality till 1613, when, at the instance of his rival, Francis Bacon, he was transferred to the chief-justiceship of the King's Bench, in consequence of his resistance to James's attempts to extend his prerogative. Bacon and James calculated that the hope of elevation to the Privy Council, which Coke's transfer to the King's Bench would dangle before his eyes, would bring him to a more accommodating frame of mind. But this expectation was doomed to be grievously disappointed. Notwithstanding a single lapse into his old bad habits of invective and subserviency in the Overbury murder case, Coke was as little amenable to royal discipline in the King's Bench as he had been in the Common Pleas; he resisted the advances of the King as firmly as the encroachments of the Court of Chancery, and in November, 1616, he was removed from his office. One might be tempted to think that jealousy of Bacon was the prime cause of his independent judicial conduct, but for the fact that he was equally bold in his defense of popular liberty in his subsequent parliamentary career, which stretched right up to and beyond the presentation of the Petition of Right in 1628, and is matter of history. Coke died in 1633. His private character was irreproachable, and his services to the law cannot be better described than in the language of Bacon: "Had it not been for Sir Edward Coke's Reports, the law by this time had been almost like a ship without ballast, for that the cases of modern experience are fled from those that are adjudged and ruled in former time."

MR. JUSTICE CAVE.

SIR NICHOLAS CONYNGHAM TYNDAL.

Sir Nicholas Conyngham Tyndal, the son of an attorney near Chelmsford, and the relative of perhaps more legal and theological celebrities than any lawyer before or since, was born in 1776 and educated at Trinity College, Cambridge. He commenced his professional career as a special pleader

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in Lincoln's Inn, and soon acquired so high a reputation in this recondite and now obsolete branch of legal science, that he was enabled to start practice at the bar. He was engaged in many famous cases, notably that of Ashford *v.* Thornton, which led to the abolition of the old wager of battle and the defense of Queen Caroline in 1820. In 1826 he was raised to the Solicitor-Generalship and the honor of knighthood on the recommendation of one of his former pupils, Lord Brougham. In 1829 he was made Chief-Justice of the Common Pleas, and held this office with dignity, efficiency and urbanity till almost the eve of his death, which occurred on July 6, 1846. The most interesting trial over which Tyndal presided was that of Macnaughton in 1843.

CHIEF-JUSTICE DENMAN.

Thomas Denman, the son of a physician of considerable reputation in his day, was born in London in February, 1779, and educated at Eton and St. John's College, Cambridge. He learned the mysteries of special pleading under the famous Mr. Tidd, and of conveyancing under the equally famous Mr. Charles Butler, and first made his mark at the bar (he was called in 1806) by his argument, sustained and carried to a successful issue against so redoubtable an adversary as Copley — afterwards Lord Lyndhurst — in Doe *v.* Colyear (1809, 11 East. 548), as to the interpretation of the rule in Shelley's case. In 1817 he defended the Luddites at Derby. In 1820 he undertook, along with Brougham and Tyndal, the defense of Queen Caroline, and maintained the cause of that unfortunate lady with a strenuousness which aroused the deep displeasure of her worthless husband, and postponed his elevation to the attorney-genalship till the accession of William IV in 1830. If Denman had to wait long for his first great honor, the second came speedily enough. Two years after he became Attorney-General, Lord Tenterden died and Denman succeeded him as Lord Chief Justice of the King's Bench. He held this office till 1850, when he retired in favor of Lord Campbell. He died in 1854. Lord Bramwell said that Chief-Justice Denman always exhibited signs of uneasiness when a really knotty point of law came before him, and it is quite true that, in spite of his early training, Denman was not a great lawyer. But he was a most upright, enlightened, courteous and independent judge. He may be seen at his best in the leading case of Stockdale *v.* Hansard.

MR. JUSTICE BYLES.

The late Sir John Barnard Byles was born at Stowmarket in Suffolk in 1801, and was called to the bar in 1831. He soon acquired an enormous practice, and although he was not only a Tory but an uncompromising anti-Free-Trader, Lord Cranworth raised him to the bench of the Common Pleas. He died on Feb. 3, 1884. Mr. Justice Byles is best remembered by two circumstances. He was the author of a standard work on Bills of Exchange (Byles on Bills, librarians call it). He was also the owner of a horse called Business. Clients inquiring for him while he was indulging in horse exercise are said to have been put off with the *equivoque* that "Mr. Byles was away on business."

Limits of space compel us to pass a number of other eminent judicial worthies briefly under review. Among the justices of the Queen's Bench must be noted Sir William Shee, the first Roman Catholic judge since the revolution, and the advocate who defended Palmer against Cockburn (1804–1868); Sir George Hayes (805–1869), a man of infinite wit (his best speech at the bar was delivered in the Matlock will case, of the facts of which readers of the GREEN BAG do not require to be reminded), and Sir Henry Jackson; an

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eminent patent lawyer, who was raised to the bench on March 2, 1881, and died before he was sworn in, six days later. Among the justices of the Common Pleas must be included the incomparable Willes, editor in conjunction with Sir Henry Keating of Smith's Leading Cases, and probably the greatest mercantile lawyer that has sat on the English bench (1814–1872); Sir William Erle (1793–1880), who, like Lord Truro and (if one may travel beyond the limits of legal life) the actress, Mrs. Inchiquin, attained the highest professional distinction in spite of a hesitation in speech; and Sir William Bovill (1816–1873), who tried the Tichborne ejectment case. Among the Barons of the Exchequer, prominent are the names of Sir Frederick Pollock (Chief Baron from 1844 to 1866); Sir Samuel Martin, the subject of the famous "scene between Jessel and Cockburn," and a judge who is said to have once called back a prisoner on whom he had just passed sentence of death without the customary commendation to the divine mercy, to say: "Prisoner, I beg your pardon; may the Lord have mercy on your soul!" and Sir Fitzroy Kelly (1796–1880). A little more space must be devoted to

MR. JUSTICE WILLIAMS.

SIR ALEXANDER COCKBURN.

The Right Hon. Sir Alexander James Edmund Cockburn was descended from an ancient Scottish family. One of his forefathers fell at Bannockburn in 1314, another at Fontenoy in 1745. The following are the chief points of note in the family history: A Sir Alexander Cockburn was keeper of the great seal of Scotland from 1389 to 1396. In 1595 Sir William Cockburn received a grant of the lands and barony of Langton, in the county of Berwick. His son William was created a baronet of Nova Scotia in 1627. The sixth of this line of baronets, Sir James Cockburn (1729–1804), had five sons, the three eldest of whom succeeded to the baronetcy. Sir James, the seventh baronet, was a major-general in the army, became Secretary of State in 1806, and five years later was appointed governor of the Bermudas. The eighth baronet, Sir George (1772–1853), was an admiral. The ninth, Sir William (1773–1858), was Dean of York. His younger brother Alexander was British Minister Plenipotentiary and Envoy Extraordinary to the state of Colombia. He married Yolande, the daughter of the Vicomte de Vignier; and their only son, the future Lord Chief-Justice of England, was born on the 24th of December, 1802. Cockburn was thus, on his mother's side, a foreigner. Her two sisters were married to Italians. He received the greater part of his early education abroad. Such an hereditary and family environment produced its natural result. He became an accomplished linguist, spoke French with native

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purity, and had an excellent knowledge of German, Spanish and Italian. This gift of tongues proved serviceable in later years. In the case of The Queen *v.* Newman, Cockburn, who was then at the bar and appeared for the defendant, by his mastery of Italian tripped up a distinguished legal witness for the prosecution — the Chief-Justice of the Ionian Islands — and practically destroyed his evidence; and he not infrequently, after his promotion to the Bench, corrected the interpreters, and even acted as interpreter himself. But to return to the point where this digression began, Cockburn was educated partly at home and partly abroad. In 1822 he entered Trinity College, Cambridge, where he distinguished himself in Latin prose and English composition, and was a prominent member of the University Union Debating Society. In 1825 he became a Fellow Commoner. Four years later he gained his Bachelor of Civil Law degree (B. C. L.) and was elected to a fellowship. His thoughts had already turned to the law. He had been admitted to the Middle Temple in 1825, and was called to the bar on the 6th of February, 1829. Cockburn at once joined the Western Circuit and the Devonshire sessions, where he soon acquired a good practice. In London, however, he was less successful, and often felt tempted to close his chambers altogether. On the advice of a friend, he was induced to keep them open, and a boy (there was no clerk) waited from 10 A.M. to 6 P.M. for the " receipt of custom " that seemed destined never to come. In 1832, however, Cockburn had his chance. In those days there was no Council of Law Reporting. The publication of reports of cases was in private hands, and was one of the legitimate means by which a barrister could bring his name under the favorable notice of attorneys. In conjunction with Rowe, afterward a knight and Recorder of Plymouth, he published a volume of cases decided on election petitions. On the 1st of March, 1823, a Parliamentary brief was delivered at his chambers. He was retained for the sitting members for Coventry, Lincoln and Dover, and was successful in all three cases. Here Cockburn was merely junior counsel, and much of the glory of his victory belongs to his leader, Follett. But he had the opportunity of displaying, and did in fact display, the skill in manipulating facts and figures and the singular gifts of exposition which were characteristics of his advocacy, and from this time his success was assured. The bare years of comparative failure and disappointed expectation were now passed, and the time of harvest speedily came. On the 18th of July, 1834, Cockburn was appointed a member of the Commission of Inquiry into the state of corporations in England and Wales, and was deputed with Whitcombe and Rushton to report on the northern midland towns, and on Leicester, Warwick and Nottingham. The reports for which he was responsible were for the most part exhaustive, and were one and all marked by great lucidity and expository power. They enabled him to make the acquaintance of the best client which he had in the early part of his career, Joseph Parkes, the chief Parliamentary agent of the Whigs (1835). Fresh election petitions fell to his lot; his general practice increased rapidly, and in 1841 Lord Chancellor Cottenham made him a Queen's Counsel. His defense of Macnaughton two years later, which is too familiar to readers of the GREEN BAG to need fresh notice here, marked him out for early promotion. In 1850 he was made Solicitor-General and knighted; in March, 1851, he became Attorney-General; in 1854, he prosecuted Palmer, the poisoner, with memorable success; in November, 1856, he was made Chief-Justice of the Common Pleas and on June 24th, 1859, he was raised to the Lord Chief-Justiceship of the Court of Queen's Bench, an office which he held through the changes introduced by the Judi-

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cature Acts, till his death on the 24th of November, 1880. It is impossible within the brief limits of such a sketch as this to do justice to the many-sided character of Sir Alexander Cockburn. He was one of the greatest masters of exposition that ever sat on the Bench — witness his judgment in Banks *v.* Goodfellow (L. R. 5 Q. B.) and his summing up in the Tichborne criminal case. As a judge he was a model of dignity and fairness. In politics he was not less successful than in law. His reply to Mr. Gladstone in the Don Pacifico debate, although eclipsed by Palmerston's *tour de force* on the same occasion, was nevertheless a mighty and successful effort of political oratory. The impression produced by it is thus described by a competent critic (McCarthy's History of Our Own Times, vol. 2, pp. 60–62): "Never in our time has a reputation been more suddenly, completely, and deservedly made than Mr. Cockburn won by his brilliant display of ingenious argument and stirring words. The manner of the speaker lent additional effect to his clever and captivating eloquence. He had a clear, sweet, penetrating voice, a fluency that seemed so easy as to make listeners sometimes fancy that it ought to cost no effort, and a grace of gesture such as it must be owned the courts of law where he had his training do not often teach. Mr. Cockburn defended the policy of Palmerston with an effect only inferior to that produced by Palmerston's own speech, and with a rhetorical grace and finish to which Palmerston made no pretension. In writing to Lord Normandy about the debate, Lord Palmerston distributed his praise to friends and enemies with that generous impartiality which was a fine part of his character. Gladstone's attack on his policy he pronounced a first-rate performance. Peel and Disraeli he praised likewise. But as to Cockburn's he said, "I do not know that I ever in the course of my life heard a better speech from anybody, without any exception." The effect which Cockburn's speech produced was well described in the House itself by one who rose chiefly for the purpose of disputing the principles that it advocated. Mr. Cobden observed that when Mr. Cockburn had concluded his speech one-half of the Treasury benches were left empty, while honorable members ran after one another, tumbling over each other in their haste to shake hands with the honorable and learned member. Mr. Cockburn's career was safe from that hour. It is needless to say that he well upheld in after years the reputation he won in a night. The brilliant and sudden success of the member for Southampton was but the fitting prelude to the abiding distinction won by the Lord Chief-Justice of England."

LEX.

MR. JUSTICE DAY.

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A NEW VOLUME OF LEGAL RECOLLECTIONS.[1]

HENRY LAUREN CLINTON, who was admitted to the New York Bar precisely half a century ago, has just published in a volume of four hundred sumptuous pages his legal recollections, under imprint of the Harper Brothers; and from it the GREEN BAG has collated some of the anecdotes, feeling sure that a taste of Mr. Clinton's reminiscences will inspire its readers with a desire for the book itself.

Mr. Clinton, now a septuagenarian, has retired from active practice at *nisi prius*, where he was always *primus inter pares*, but he continues his legal affiliations as a jurisconsult. He is a man of fortune solely through his professional experience, and is recognized by the New York City Bar as having received as counsel, toward sustaining the contested will of the late Commodore Cornelius Vanderbilt, the largest fee known in its local annals — a quarter-million of dollars.

Mr. Clinton's earliest bar recollection was of a five hours' argument made by Daniel Webster when the narrator was a law student in 1845. The great American Commoner made contention that the City of New York was liable for damages to private owners whose houses, by municipal order, gunpowder had blown up and destroyed in order to arrest progress of a great conflagration. Mr. Webster's figure, voice, gesticulation, logic and eloquence are referred to by the one adjective majestic. The listening court was the former hybrid Court of Errors composed of four judges of lower courts and state senators, most of whom were laymen. The occasion was a reargument, or a substantial appeal to the same court to reverse a prior decision against the liability of the city that had been obtained by a majority of five — the judges in the minority; but the majority, composed of laymen, sympathizing with the city tax-payers, who dreaded being mulcted in enormous damages. After the Websterian argument, the orator was alleviated of his exhaustion by a luncheon at which he was complimented for his marvelous effort, when he replied, "Gentlemen, I was uncomfortable during the delivery of my argument, for to speak frankly, I felt as if I were addressing a packed jury." And substantially he had been; for the laymen abided by their previous views. It was the curious position of laymen in that court being able for political or economic reasons to overrule judges that during the following year procured the State constitution to be amended so as to substitute lawyers exclusively. During the Websterian argument Chancellor Walworth, who was apt always as an auditor on the bench to degenerate by interruptions the argument into an aggravating, discursive and conversational warfare, evidently deterred by Mr. Webster's majesty of demeanor, only once interposed a question to him and a question rather irrelevant. Mr. Webster paused with the look of a lion when interrupted in his lair by a hunter, and with a few calm, dignified, and semi-scornful sentences froze the Chancellor into a silence never again broken.

An anecdote is added as to the discomfiture of Walworth on another occasion, when the latter interrupted an arguing counsel with, "You are all wrong," when counsel remarked, "I could not find reason for authority for any other course."

"Then you should have consulted counsel who might have put you right."

Rejoined the arguer with charming irony, "Unfortunately, since your honor went upon the bench there has been no counsel at the bar to whom I could have applied in order to receive the advice you now award me."

[1]EXTRAORDINARY CASES, by Henry L. Clinton. Harper Bros., New York.

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When Judge William Kent was succeeded by John W. Edmonds as circuit judge — a very accomplished civil, but not at all a criminal lawyer — the latter asked the former for a leaf from his experience in trials of accused, so as to escape error; and the answer came, "Decide all legal questions in favor of the prisoner, but in your charge give him the devil on the facts."

During a homicide trial in which Mr. Clinton was junior counsel, Ex-Attorney-General Ambrose Jordan, known at the bar as "the vitriolic," had while before a rural jury heaped villification upon New York City; but was retorted upon by its District Attorney with the exclamation, "Why, if it be so vile, did the counsel long ago leave peaceful practice in his native town on the peaceful shores of the Hudson River, and permanently resume practice in the horrible city?"

"I only removed there as a missionary," was the quiet and happy retort.

In the same trial Mr. Clinton's client was a woman charged with murder and arson, of whom museum manager Barnum had made a hideous and libelous wax figure and placed on exhibition. She wished him sued at once for libel; but of course, pending trial, the project was dissuaded by her counsel. When, after having been once erroneously convicted and sentenced to death, she was on this second trial, to the astonishment of the public, acquitted, the only remark she made on the announcement of her luck was in exultant tone to her counsel, "And now we can sue Barnum."

There is a characteristic anecdote of Recorder Scott of New York, whom as a layman his political party had put upon the criminal bench. Counsel, during a trial before him, read repeatedly and voluminously from some law-books to the jury; and Scott, when he charged, said: "Gentlemen, you have heard what counsel for the prisoner read to you. You may accept it; for whatsoever is read from a law book is the real bona fide law and no mistake."

At the end of a long trial, that resulted in acquitting a wronged woman for killing her lover, although the testimony was pretty clear for murder, while the popular sympathy was strongly with her, Court, counsel and jury retired to a neighboring hotel for supper. Recorder Tallmadge rose to propose the health of the foreman, and in these words: "He nobly did his duty, notwithstanding his oath."

During an argument by John Van Buren upon an appeal, the presiding judge remarked: "We do not see anything in your first point."

"Then, your honors, I shall proceed to my second point."

A similar observation was made by the judge to that also, followed by Van Buren going unruffledly to the next, and so on until a sixth point was reached. The judge interrupted again and added: "We have been looking over your whole book of points, and really see nothing in any one of them."

"Neither did I when I made them; but as your three honors were much better lawyers than I am, I fancied you might discover reason in them."

Another Recorder (Riker), in sentencing an exceedingly loquacious female, who had repeatedly interrupted witnesses and counsel during her trial, said to her: "I send you to prison. There will be hard fare, with which, perhaps, using fortitude, you can bear. But it will require all possible fortitude and prove a heavy burden of punishment upon you to sustain the months of silence that I now sentence you to endure."

Samuel Jones, the second, after having been Chancellor, became, when chancery was constitutionally abolished in New York, a judge. He was often observed on the bench to be drowsing and to all appear-

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ances fast asleep, which often annoyed the lawyers addressing the Bench of which he was a member. Referring to this peculiarity, one of his associates remarked: "Jones may appear to be asleep, but let any one state or quote bad law when he is somnolent, and, after nudging me, he awakes instantly."

Mr. Clinton, in advising professional brethren to never abdicate any part of their office in the conduct of a case at the suggestion of a client, by accepting the latter's views against their own professional judgment, gives a remarkable instance of that folly from the celebrated divorce suit of Edwin Forrest, the tragedian, against his wife. She was the plaintiff, and so hard pushed was her counsel, Charles O'Conor, for evidence of her charge of infidelity, which had been made general, that he took the risk of calling the defendant to prove it. But the questions were ruled out on the ground of criminating privilege. There appeared only one bit of testimony touching infidelity, and that of mere implication, when Mr. O'Conor rested. John Van Buren, the tragedian's counsel, wished to move non-suit. The presiding judge long afterwards admitted that if the motion had been made he must have granted it. Edwin Forrest, however, had counter-pleaded infidelity against his wife, and being exceedingly bitter against her, desired the incrimination proceeded with, to her exposure and annoyance, and Mr. Van Buren yielded his judgment to the strong protests of his client, but with the result not only of utter failure as to her alleged co-respondents, but with that of bringing volunteer testimony to Mr. O'Conor from correspondents outside the court room of Forrestian peccadilloes, in consequence of thirty-three days of publicity and popular gossip; which new evidence in the end convicted Forrest. The instance cited furnishes a valuable precedent to students and practitioners.

Mr. Clinton brings to the notice of this generation one of the most versatile and clever of forgotten New York lawyers, Horace F. Clark, a son-in-law of the elder Cornelius Vanderbilt, who, however, in his latter years confined his professional duties entirely to the railway enterprises of the Vanderbilt family, and to accepting a seat in Congress towards furthering certain marine schemes of his father-in-law. Clark is described as keen, aggressive, persistent, and charged even with an electric battery of caustic impudence.

When only a young attorney he was pitted in a trial against an eminent lawyer, Hugh Maxwell, who was District Attorney, an eminent counselor, and father-in-law of the great Civil War general, Phil Kearney. Clark dogmatically dissented from a legal proposition advanced by Maxwell, who, presuming upon his age, patronizingly addressed his antagonist with, "My young friend, I ought to know from my long experience at the bar. Why, I tried cases long before you were born."

"That is so," returned Clark. "I have heard men tell about them: two before my birth and one since."

An anecdote characteristic of Horace Greeley's caution is narrated. An editor, having had a bitter personal controversy with Colonel Watson Webb, another editor, was thought by a suitor to be an excellent witness to prove the latter's character, which was in dispute. To the suitor's surprise Greeley returned this answer: "Webb has both good and bad qualities in such excess that I really cannot strike the balance which your question calls for."

Mr. Clinton, in concluding his legal recollections, relates the unfortunate case of one of his clients, who was—upon circumstantial, dove-tailed with questionably expert medical testimony regarding poison—convicted and hanged, all the while pathetically protesting his innocence; and who afterwards, by the confession of a

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jealous woman, that was corroborated by extraneous testimony, was proven to be, as he had averred, entirely innocent; yet for whom judges had denied a stay and a Governor had refused a commutation of the death sentence to an imprisonment for life. Mr. Clinton calls the fate of his client a judicial murder. And it seems to be justly added to the grim catalogue, already long, of innocent persons executed.

SOME ASPECTS OF THE GROWTH OF JEWISH LAW.

By David Werner Amram.

II.

The Influence of Changing Custom on the Torah.

HAVING observed that the origins of Jewish law are found in the ancient customs of the people, and that these ancient customs were for a long time the only regulative authority among them, we shall now consider the relation of common custom to the written law, the Torah. In their discussion of the Torah, the rabbis found theory and practice often opposed to each other. The Torah was fixed and unalterable, and, theoretically, no human power could change it. "Thou shalt not add thereto nor diminish therefrom." (Deut. xiii, 1.) It would be difficult to conceive a more solemn attempt to fix the landmarks of the law beyond removal than was attempted in the Torah. The mantle of divine authority was thrown about it, the sanction of the divine will was its enacting power, and the dread of divine vengeance threatened its transgressor. Nevertheless, in actual practice, the strict letter of the Torah gradually yielded to the pressure of altered conditions in the national life. The changes thus arising were explained by the rabbis, as above indicated, by saying that the oral traditions as well as the Torah were of divine origin. How great the change of law had become in the later days of the Jewish Commonwealth, and thereafter, is indicated by citing a few important examples. The destruction of the Temple carried with it the practical abolition of the entire volume of Mosaic and traditional law relating to the sacrificial system, the functions, dress and authority of the priests, and all matter connected with the Temple and its service; and in place of all these arose the Synagogue, with its prayers instead of sacrifice, and its ritual entirely different from anything contemplated in the Mosaic code. When the Jews were dispersed throughout the world, all the laws relating to Palestine, to the possession and ownership of the soil, became a dead letter, and the law of the people among whom the Jews lived became law for them also, in so far as all matters affecting their civil status were concerned. It is necessary to state that the rabbis did not consider these laws abolished, but merely as being held in abeyance until the restoration of the Jews to Palestine, when they would again *ipso facto* come into full force as of old.

The death penalty for crime, which is enjoined in the Torah, was gradually modified so as to be practically abolished by the traditional law.

Polygamy, with all the laws relating to it, was practically abolished at a very early period, and in the eleventh century was formally interdicted by a decree of a Sanhedrin at the city of Mayence in Germany. The maxim of the Roman law, *cessante ratione legis cessat lex ipsa*, "the reason of the law ceasing, the law itself ceases," controlled the evolution of the Jewish law also, and was the principle

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that underlay these many changes and modifications of the written law. An interesting example is found in the laws relating to the taking of interest for loans. The Torah (Deut. xxiii, 20) forbids a Jew from taking interest of another Jew, although allowing interest to be taken from non-Jews. "Thou shalt not take interest from thy brother, interest of money, interest of victuals, interest of anything that is lent upon interest; from an alien thou mayest take interest; but from thy brother thou shalt not take interest, in order that the Lord thy God may bless thee in all the acquisition of thy hand, in the land whither thou goest to possess it." This law was easily applicable to a people living largely in an agricultural state, with commerce undeveloped. The traditional law enforced this law of Moses vigorously; the man who loaned money upon interest was termed a blasphemer; all the parties to the interest-bearing contract, the borrower as well as the lender, and even the witnesses were considered equally culpable. After the great dispersion of the Jews and the beginning of Christian oppression, their economic life underwent a complete change; instead of agriculture they were forced to adopt trade and money-lending as a means of livelihood; the Mosaic law had to yield to the change of circumstances. At first a legal fiction was adopted by the rabbis, whereby the form of the old law was preserved: the lender was supposed to become the partner of the borrower, in the enterprise for which the money was used, and therefore entitled to share in the profits; and this share in the profits was simply another name for interest on the loan; in course of time this form was also abandoned, and the rabbis freely acknowledged that a Jew could take interest on money loaned to another Jew. Among others, this statement of the law was formally given by the Sanhedrin that met in 1806 at the call of the Emperor Napoleon, to advise him as to matters affecting the Jewish citizens of France.

Influence of Foreign Law.

One of the factors in the development of the Jewish law was the influence of foreign law.

The Mosaic law sounds a note of warning against the proneness of the people to adopt the customs of the heathen by whom they were surrounded. "Ye shall not walk in the customs of the nation which I cast out before you." (Levit. xx, 23.) "After the doings of the land of Egypt, wherein ye have dwelt, shall ye not do; and after the doings of the land of Canaan, whither I bring ye, shall ye not do; neither shall ye walk in their customs." (Levit. xviii, 3.) From the writings of the prophets it appears that the customs of Edom and Moab, Babylon and Assyria, and all the nations round about, were striking root among the Hebrews. Many of these customs were morally abominable, and called down the thunder of the prophetic voice; other customs affecting the daily intercourse of men were, no doubt, entirely harmless. The assimilative qualities of the Jewish character have often been commented on; the Jews have spoken all languages, have adopted all social customs, have thought the thoughts of all nations, have dressed and conducted themselves like all the civilized peoples of the earth, and yet they have remained Jews; in their laws they have been no less eclectic.

The Talmud contains numerous *indicia* of the influence of Persian, Greek, Roman and other legal systems upon the Jewish law. The very name of the highest tribunal at Jewish law, the Sanhedrin, is Greek; the Greek language became the language of the cultured classes after the invasion of Alexander the Great; some of the greatest literary remains of this era are written in Greek, the Apocrypha, the Septuagint, some of the books of the New Testament, the works of Philo and Josephus. Such technical legal terms in the Talmud as *Hypotheke*, *Diatheke*, *Prosbule* and *Epitropos* indicate the influence

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of Greek law on some of the most important legal relations. In like manner the Roman law left its impress on the system of the Jews; and the general doctrine enunciated by Mar Samuel, "dina d'malkhuthé dina," "the law of the land is the law," shows the strong influence that contemporaneous legal systems had upon the Jewish law.

The value of the experience of other nations in solving questions of law was fully recognized by the Talmudists, and was applied in the elucidation of many points in the Jewish law. In the treatise Sanhedrin (39 b) there is a discussion upon two apparently contradictory texts in the book of Ezekiel. In the one the prophet chides the people for not having done according to the judgments of the other nations, and in the other passage he upbraids them for having done according to the judgments of the other nations. This contradiction is explained by the Talmudists by saying that Ezekiel meant to say, "Ye have not done according to the good judgments of the other nations, but you have done according to their evil judgments"; and they imply that the good judgments, founded in principles of justice and righteousness, are worthy of imitation and adoption; a rational and practical view, and one that has guided the great lawyers, Jew and Gentile, at all times.

The Influence of the Sanhedrin.

After the Torah, the supreme political authority was successively vested in the kings and the Sanhedrin. It is a remarkable fact that there are no new laws on record which can be attributed to the kings; and the decrees of the Sanhedrin which were entirely new or in derogation of the Mosaic law are exceedingly few. In that old state of society in the Orient, manners and life changed but little, and the old laws of the pre-regal period were quite as well adapted to the times of Ezra or the Maccabees. Even to this day, many of the customs of the patriarchs are, after four thousand years, still found extant among the nomadic Arabs. It is probable that there was but little legislation of any kind after the Biblical code was completed, and the law of the land was in hand of the judges, who applied it in the cases before them. The Sanhedrin even at the period of their greatest vigor and power were more of a judicial than a legislative body. But whenever they did make law, whether in their legislative or in their supreme judicial capacity, all men were bound to follow their enactments and decisions. The authority of the Sanhedrin arose out of the political situation of the people, but rabbinical reasoning founded this authority upon a law in the book of Deuteronomy (xvii, 8–13).

"If a matter be unknown to thee for decision, between blood and blood, between plea and plea, and between stroke and stroke, or matters of controversy within thy gates; then shalt thou arise, and get thee up into the place which the Lord thy God shall choose; And thou shalt come unto the priests, the Levites, and unto the judge that shall be in those days, and enquire; and they shall inform thee of the sentence of the case; And thou shalt do according to the sentence, which they may tell thee, from that place which the Lord shall choose, and thou shalt observe to do according to all that they may instruct thee: According to the sentence of the law which they shall teach thee, and according to the decision which they shall tell thee, thou shalt do; thou shalt not depart from the sentence which they shall show thee, to the right hand, nor to the left. And the man that will do presumptuously, and will not hearken unto the priest that standeth to minister there before the Lord thy God, or unto the judge, even that man shall die; and thou shalt put away the evil from Israel. And all the people shall hear, and be afraid, and do no more presumptuously."

This law indicates the course of a case which is appealed from a lower court in one of the towns to the supreme court or San-

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hedrin at Jerusalem, whose decision in the case was final and conclusive.

The decisions of the Sanhedrin had the same authority as the Torah, upon which they were based and which they interpreted. The wisdom of the learned conceived that no law was or could be immutably given for all time, and that some authority must be established to interpret and explain its meaning, and adapt it to the changes of time and circumstance, and to the varying phenomena of human life. The decisions of such an authority, therefore, were of equal validity with the original law, and could not readily be overruled. Indeed it was a maxim at Jewish law that no Sanhedrin could repeal the ordinances of another Sanhedrin unless it was greater in wisdom and numbers. (Mishnah Eduyoth I, 5; Talmud Babli Megillah, 2 a.)

No Sanhedrin could contain more than seventy-one members; therefore it follows that, although another Sanhedrin may be greater in wisdom, it cannot be greater in numbers. This maxim was therefore interpreted to mean that no Sanhedrial decree could be abolished except by a Sanhedrin greater in wisdom and with the consent of all men learned in law; in other words, by a unanimous resolution of all the people. (Maim. Mamrim II, 2.) Such was the weight attached to a decree of the Sanhedrin.

The Influence of the Rabbis.

In ancient society the patriarch or the shophet was the sole law-maker; after the law was written down the function of the judge was narrowed down to interpreting it; and it was in their function as interpreters of the law that the rabbis contributed greatly to its development. They also performed the work of codifying the law at various times, and thus rendering it more easily accessible and intelligible. They rarely attempted to make new law, although there are some cases on record in which this was done; and even they who assumed this authority did not found it upon any inherent right in them to legislate. They made changes on account of great public necessities, or under the stress of sudden changes in conditions, and then suffered the people in the course of time to accept or reject the change or innovation. No one man could lay down laws which would be accepted as binding upon all Israel; no Talmudical doctor would dare to stand comparison with the great law-giver Moses. The decisions of individual rabbis, so far as they diverge from the old law, are binding on nobody else. Even the decisions of the great rabbinical assemblies or Sanhedrin bind only those represented therein. The principle of representation was carried to its logical extreme. For instance, the great Synod of Rabbi Gershom of Mayence, composed of one hundred distinguished rabbis of Northern Europe, decreed, among other things, that no woman shall be divorced against her will unless she has proven guilty of some offense which lawfully entitled the husband to divorce her; they also decreed that polygamy should be interdicted under the penalty of excommunication. These decrees were accepted as authoritative by all the people of the states represented in the Sanhedrin, and afterwards by all who accepted the authority of the Shulhan Arukh. But Maimonides, who compiled his Code of the Law one hundred and fifty years later, entirely ignores them, and states the law to be the same as it was before the decrees of Rabbi Gershom's Synod were promulgated. Old laws were not thus changed; even those men of great authority and learning, whose preeminence was recognized, exercised but little influence *individually* in changing the law. Time, which brought about changes in manners and in customs and in thought, wrought the changes in the law. Every legal decision and every statutory enactment is the result of a change of sentiment among the people or the reflection of such a change. It merely states in formal terms what the people have determined the law shall be.

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From the foregoing various indications, it will be seen that Jewish law did not differ in its growth and development from the legal systems of other great nations. Its ancient codes were modified and changed by the subtle but irresistible influence of time. The will of the people creates the law; even under the most autocratic rule, the voice of the people is ever heard in protest against the tyranny that seeks to disturb its ancient customs and common law.

The voice of the people is the voice of God, and the Mosaic laws were modified according to this principle. This instinctive legislation of the people, although irresistible in its impulse, is exposed to a great danger. Being without definite form and arising out of many minds, it will loosen the bonds of social and political organization, unless unity is given to it by some acknowledged authority.

This was the labor of the Talmudists; to gather together the mass of traditional law; to systematize and arrange it; to cast it into form and shape, so that it might be intelligible to all, obeyed by all, and protected against the danger of individual caprice.

The Talmud is justly considered, by those who understand it, as in no sense inferior to the Torah. The Torah was the law in its day, and for the later generations the Talmud took its place. The law progresses at all times; and the Talmud is a legitimate child of the earlier law, which developed according to the natural and common growth of all law among all peoples, in harmony and correspondence with the changing conditions of human life. The Talmud is not free from error, for the whole history of law is the story of human error. But mistakes are the accidents in the law, and order and progress its essential and permanent elements. The common sense of mankind recognizes this truth, and men are content to live by law, although they may at times suffer for it.

The legal soundness, the moral righteousness, and the unfailing justice of the Talmudic code are its distinguishing characteristics, and it will in time be accorded the place that it deserves among the greatest creations of the human intellect.

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BY IRVING BROWNE.

CURRENT TOPICS.

CRITICISMS OF THE JUDICIARY. — It will be an occasion for regret to many that the learned and dignified "American Law Review" lends its pages to the circulation of Governor Pennoyer's incendiary and foolish utterances against the power of the United States Supreme Court to set aside an unconstitutional act of Congress or of a State legislature. All lawyers know, of course, that the editors of that excellent periodical do not approve their contributor's peculiar views, but this will not prevent a general regret that they should give any opportunity to such a crazy and dangerous creature to exploit them. It is very much as if the Rev. Dr. Parkhurst should lend his pulpit to Bob Ingersoll in order to enable him to abuse the Christian religion. Pennoyer is no better than an anarchist; indeed, he is worse, for he is a mere demagogue, which very few anarchists are. Let him print his ridiculous notions in some country newspaper, and fume and threaten the justices with impeachment, and ride his horse in gore to the bridle in imagination in such harmless obscurity. If he could only somehow form a partnership with Ignatius Donnelly in the political business it would seem very fitting.

We join the "New York Law Journal" in regret also that the "Review" should deem it necessary to charge the New York Court of Appeals with favoritism toward corporations, on account of their decision in Cosulich *v.* Standard Oil Company, 122 New York, 118. To quote the "Review's" language: —

"That case nakedly holds that evidence that an oil refinery in charge of the defendant exploded, causing a quantity of burning oil to flow down a pipe used for pumping oil to the works from vessels moored at the wharf of the company, from which burning oil a lighter moored at the wharf took fire and exploded, communicating the fire to the plaintiff's vessel, is not sufficient to take the question of negligence to the jury, and that upon such a state of evidence the Court below erred in refusing a non-suit. The Court holds that the rule of *res ipsa loquitur* is not applicable in such a case. Exactly the reverse should have been held."

The Court could not have held differently without contradicting the uniform course of their decisions. They held the same doctrine, in respect to an explosion of a steamer boiler, in Losee *v.* Buchanan, 51 N. Y. 476, which certainly was not a corporation case, and that has been the well recognized doctrine in respect to spread of fires, ever since Clark *v.* Foot, 8 Johns. 421. They found the decision in question on Losee *v.* Buchanan, and fortify it by citations from Iowa, Ohio and Tennessee. They even cite the indubitable authority of one of the learned Reviewers, Judge Thompson himself, as follows: "It is believed that it is never true, except in contractual relations, that the proof that the mere fact that the accident happened to the plaintiff, without more, will amount to *prima facie* proof of negligence on the part of the defendant. 2 Thompson on Negligence, 1227." Judge Thompson publishes the Losee case in full in his approved work on Negligence, and says that it "undoubtedly proceeds upon the true ground."

The decision in question may also probably be upheld on another ground, namely, the New York rule concerning proximate and remote cause of damage, as laid down in Ryan *v.* N. Y. Cent. R. Co., 35 N. Y. 210; but as that was a corporation case we will not urge it, and, indeed, that doctrine was not relied on in the Cosulich case.

The Court may be wrong in principle, although there seems highly respectable authority to sustain them, as cited above; but there appears to be no reason whatever for charging the Court with favoritism toward corporations on account of this decision.

A NEW SPECIES OF DEMONSTRATIVE EVIDENCE. — In a recent English case of Gladys Ffolliott, an actress, against the Nottingham Theatre Company, for injuries sustained by falling through a dilapidated stairway in the theater, the plaintiff had a verdict of $5000, chiefly attributable to the evidence of x-ray pictures of the injured foot, showing serious displacement of the bones. This is said to be the first instance of the introduction of this species of evidence. An appeal is pending, but there would seem to be no more impropriety in this evidence than in the case of ordinary photographs. They are good for what they are worth, and that is a question of expert testimony. Miss Ffolliott seems to have had better luck than Miss Seymour, the chorus singer, in her suit against Maddox (16 Q. B. 326), for injuries sustained by falling through an open trap-door in passing off the stage. The Court, in the latter case, were comparatively in-

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different to the lady's sufferings, observing that a person accepting employment in such premises, unless the master has contracted to light them, "must make his choice whether he will pass along the floor in the dark or carry a light." That case lays down very doubtful law, was questioned in Ryan *v.* Fowler, 24 N. Y. 410, and seems contrary to the trend of modern adjudications. Miss Seymour ought to have been a "star," or else to have carried some x-rays with her.

EARNING ONE'S SALARY. — Some of the citizens and tax-payers of St. Louis seem determined that their mayor shall earn his salary. It appears that the mayor is a frequent absentee, and that when he goes away on private business the president of the Council acts as mayor and draws salary as such; notwithstanding which the mayor insists on having his full salary paid. The suit is for an injunction restraining the city treasurer from paying the mayor his salary during the time he has been absent, the amount involved being $1,117.37. So far as we know, this is a completely novel case, and its outcome will be awaited with a good deal of interest. Although it might be difficult to "dock" the salary of such an official on account of his absence from the post of duty, yet there seems no good reason for paying another for the service which he owes, and in paying him also for it. It will probably turn out that there is a weakness in the city charter or ordinances which does not prohibit such double pay, for very few municipalities have foresight enough to foresee that their servants will neglect their duties.

PUNISHMENT FOR CONTEMPT. — Some news comes from the west which will greatly encourage all friends of law and order in this country. Several months ago it was recorded that Chief-Justice Snodgrass, of the Tennessee Supreme Court, had introduced a novel and summary, but what promised to be a very effective method of punishing contempts of court or of the magistrates as individuals. A lawyer had "sauced" him in a newspaper, and the Chief-Justice pulled out his gun and shot him on the street. Fortunately he was a bad shot, and so he did not kill him, but only wounded him to a cautionary extent. A grand jury, utterly blind to every instinct of honor, forgetful of the reverence due the Bench, and not making sufficient allowance for the insufferable nature of the provocation, had the bad taste to consider the Chief-Justice as a criminal, and to subject him to the mortification of an indictment for assault with intent to murder, and to the indignity of being dragged to the bar like an ordinary felon, and standing trial as if he were merely the occupant of a cobbler's bench. The result is exactly what might have been predicted of that lion-hearted and sensitive people among whom he dwells — he was acquitted. The ground of acquittal has not reached us. Probably it was not on the ground of insanity, for his omission so to resent the insult put upon him would have been more apt, among his chivalric constituency, to have aroused the suspicion of insanity. It was probably on the common, but not very distinctly legal ground of "serve him right." And so it did. The lawyer, instead of writing against him in a newspaper, and thus affording grounds of legal relief, ought to have picked a quarrel with him and raised a duel. There may be reasonable fears that other grave magistrates in civilized countries will not have the courage to adopt Chief-Justice Snodgrass' efficient mode of dealing with impudent lawyers. It would excite surprise to see Chief-Justice Fuller or Lord Chief-Justice Russell engaging in this ***argumentum ad hominem***. It will probably remain the choice and peculiar flower of Tennessee civilization, planted by the magistrate and fostered by the jury. "All flesh is grass," said the prophet. Let us rejoice that all flesh is not Snodgrass!

"EXTRAORDINARY CASES." — A comely volume, under this title, from the press of Harpers, presents the recollections of Mr. Henry Lauren Clinton of his legal practice. He is well known to New York people as an experienced, ingenious, devoted and successful practitioner, especially in criminal cases. The author has defended in about one hundred murder cases, and has had but one client hanged. The book is very readable and is in good taste and admirable reserve. We have read it all, except two long speeches to the jury, which are given in full, and into these we have glanced sufficiently to satisfy ourselves that like most effective appeals to the jury, they are not good reading, and that the rhetoric is occasionally a little lurid. But Mr. Clinton's account of the legal phases of the important cases in which he has been counsel is interesting and frequently very suggestive and useful. His reminiscences and sketches of the great men of the early New York Bar are exceedingly entertaining, and much of this is quite fresh. Mr. Clinton's power of description and his sense of humor are marked. He conveys a good deal that is new, curious and amusing about Brady, Clark, Cutting, Gerard, Graham, Edmunds, Jones, Oakley, Ogden Hoffman, O'Conor, Ogden, Jordan, John Van Buren, Blunt, Ira Harris, Henry E. Davies, Horace Greeley, Daniel Webster and others. He gives one anecdote of Webster and Walworth about which we find ourselves skeptical, for we cannot believe that the interrupting Chancellor was ever awed into silence by anybody or anything short of

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the Code of Procedure, which abolished his court. Mr. Clinton attributes the abolition of the Court of Chancery to the disgust felt by the Bar at this disagreeable peculiarity of the Chancellor. We think Mr. Clinton is in error in saying that David Graham "drafted a large part of the Code of Civil Procedure which was passed by the Legislature." It is our recollection that Mr. Field informed us that most of it was his own work, and that he drew many of the sections many times over before they came to the final form. Mr. Clinton's book is especially rich in reminiscences of David Graham and James W. Gerard. The former, before he was twenty-one, wrote the best work on practice ever made, and sold it for $500 to publishers "who netted thirty thousand dollars from the publication." Mr. Clinton enlightens us on one point which has always been a mystery to us, namely, the delay of some five years between the argument and the decision of the famous Lemmon Slave case in the Supreme Court. New York merchants paid Lemmon $5,000 for his slaves, and he cared no more about it, until the State of Virginia, "having been aroused in regard to the slave question," requested her attorney-general to stir up the case. Mr. Clinton, having been engaged for the master, withdrew in favor of O'Conor on the appeal. Mr. Clinton pays a merited tribute to our contributor, A. Oakey Hall, who was eight years assistant district attorney, and twelve years district attorney of the county of New York, as "courteous, fair, skillful, persevering and faithful," "thoroughly versed in criminal law," evincing "admirable tact, good judgment and consummate ability"; his addresses, "able, effective, and at times, eloquent"; "there his talents shone to great advantage." Mr. Hall is one of the very few living men of whom Mr. Clinton speaks. We fully agree with Mr. Clinton that the decision of the Court of Appeals, in the Lowenberg case (27 N. Y. 336), is a curious monstrosity where a man was sentenced to imprisonment for life without any law for it, or even any attempt to formulate any on the part of the five judges who agreed to it, and where the only opinions published, or written so far as appears, are those of the three dissentients, which are perfectly conclusive against the decision. If lawyers may differ about this, there can be but one opinion of the case of Crimmins, who was convicted of murder under the same defective law as Mrs. Hartung and Shay, and who, being too poor to appeal and whose application for commutation being refused, was executed, while the other two got off scot free. "A judicial murder," says Mr. Clinton, and so all must say. It is pleasant to turn from those dark pages to the account of the acquittal of the famous Polly Bodine, accused of murder, whose first thought was of suing Barnum for exhibiting an unflattering wax figure of her, and of those dinners (A.D. 1850) furnished by the city to the court, counsel, and invited guests, — twelve or fifteen courses, and all kinds of wine and cigars,— at which the diners regularly sat from one o'clock to seven, while the jury were in waiting from two o'clock, having been regularly cautioned by Recorder Talmadge to return from their dinner in an hour and "not keep the Court waiting." Dining seems to have been the principal event in the professional life of those days. Another dinner was given to the court, counsel and the jury who acquitted a young woman who had tried to kill her seducer, where the same recorder proposed the health of the foreman of the jury, "who so nobly did his duty — *notwithstanding his oath*." The only weak point in the book is (as usual) the index, in which we look in vain for the name of Field or Walworth, or for any direction to those dinners.

THE FAD OF K. — Among the most senseless of the modern educational fads is that of converting C into K, in the pronunciation of words derived from the Greek or Latin. For example, instead of *ceramics*, we are instructed to say *keramics*, although to be consistent it ought to be spelled *keramiks*. There may be some propriety in thus spelling and pronouncing words derived from the Greek, which had no C, but what can be said in defense of the application of this practice to words derived from the Latin, which had C, and no K? Therefore we kick at Kikero, and as for Kaisar for Caesar, it is, as Marjorie Fleming said of seven times seven, "what Nature herself can't endure." What excuse is there for "Kelt"? There is no consistency among the practitioners of this fad, for in respect to a word so clearly derived from the Greek and in such very common use as "bicycle," none of them have yet had the audacity (or audakity) to prescribe "bikikle." How would Tennyson groan at "a kikle of Cathay"! Let us not overwork the letter K, but recall Choate's remark about "overworking the participle"— or partikiple.

WOMEN AS PROCESS SERVERS. — Somehow the chairman has lately heard that above seven hundred new occupations are now open to woman. In "The Scarlet Letter" Hawthorne observed that needlework was the only art open to women. A novel one has just been called to his attention by a circular sent to him from Margaret I. Summers, of Brooklyn, N. Y., who annnounces that her "specialty is the satisfactory service of summonses, etc., in the metropolitan district of the greater New York, for out-of-town appreciative attorneys. Once tried I always retain the attorney as my client." "I succeed where others

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fail." "My woman's tact and experience assure my universal success." "Terms moderate." Accompanied by honeyed words from several lawyers. Miss (or Mrs.) Summers ought to succeed on account of her self-confidence, if from nothing else. If she were a man, it should be called "cheek." One suggestion is now offered: let her accompany her circular by her portrait, and it would probably attract the attention of the careless and "serve as a guarantee of good faith." The chairman has no papers to be served, but is glad to call attention to this novel scheme of this ingenious and probably deserving woman.

"THREE HEADS."—"The Chicago Legal News" publishes a picture of the Chairman with his two grandchildren, with many words of commendation so kind that we should blush to republish them, and the following verses, which may appeal to others similarly situated: —

THREE HEADS.

Brown-head and Yellow-head, both fair to see,
Cling around Gray-head, and climb on his lap;
Mounted securely on grandpapa's knee,
Ready for play or for stories or nap.

Brown-head insists on a tragical tale
Of lions in deserts, who like man-meat;
And terrors that turn old travelers pale
Don't move him a whit in his chosen seat.

Yellow-head prattles of dolly and gown,
Explains how the carpet she neatly sweeps;
She looks at the "wheels" with a watchful frown,
And combs her old Gray-head until he weeps.

Brown-head is five years and Yellow-head three,
Gray-head they think must be twenty at least;
But in one notion they fully agree,
That only by loving is love increased.

Not very long till they are all of an age;
Wisdom is equal when all's said or sung;
Man getting foolish and child growing sage,
Young waxing ancient and old turning young.

IRVING BROWNE.

"WHAT IS TRUTH?"— It seems to us that the paragrapher who gave the anecdote of Lord Coleridge in connection with this question, in the May GREEN BAG, was in error in attributing it to his Lordship's delight in professing "ignorance of things supposed to be of common knowledge." It seems more probable that his Lordship was simply echoing Pilate's famous question, or perhaps that of Dickens's Chadband. That would have given the point of wit to the inquiry instead of the bluntness of ignorance.

BEN FRANKLIN'S WILL. — The great philosopher, economist and statesman was, in a sense, a "Bawston man," and the Boston people have done him an ill turn by setting up a hideous statue in his despite. This, notwithstanding that a hundred years ago he left by will a thousand pounds to officials of the city in trust for the use of the young mechanics, and to be thereto appropriated at the end of a hundred years. He hoped that the fund would then reach a half million dollars, but it amounts only to a little above one hundred thousand. The will was proved in Philadelphia in 1790, and a few weeks ago, on petition of the mayor of Boston, it was admitted to probate in the latter city, for the purpose of dealing out the legacies. It was fortunate for Ben's purpose that he lived before the days of jealousy of such restraint of alienation. The fund in question consisted of land in Boston, and it does not speak well for the prosperity of that city that it should have increased but tenfold in a century. It would increase to that extent in ten years in Buffalo, in New York in about ten months, and in Chicago in about ten days!

BRITISH FAIR PLAY. — The Chairman, in the secluded life which he has led, has the misfortune never to have heard of Mr. Richard W. Hale, who, in a recent number of the "American Law Review," pronounces a note in this department on "British Fair Play" to be characterized by "unmanly petulance." Therefore his nationality is unknown to us; but if he is an American he must be unnaturally magnanimous if he can discover any fair play in the recent British transactions in the Transvaal. For curiosity's sake we have re-read our offending paragraph, and we stick to every word of it, and thereto we put ourselves upon our country.

NEW USE OF DOGS. — A new use has been found for dogs, namely, as detectives of criminals. In State *v.* Hall, a recent trial for larceny, in Ohio, the detective work of a dog was put in evidence. Some of the stolen property was found near the scene of the theft, and was shown to the dog, and then he was shown footprints close to it, and being put on the track he followed it unhesitatingly some two hundred feet to a gate, then inside the gate up to two front outside doors, of which he chose the left-hand one, then inside to the prisoner's door. It was shown that the dog had been trained to this business, and thoroughly and successfully tested, even where persons on whose tracks he was put had started from twenty to forty hours ahead of him. The evidence was admitted, and is justified by the authority of

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Hodge *v.* State, 98 Alabama, 10; 39 Am. St. Rep. 17, a case of homicide. This is much more satisfactory evidence than the blundering, bull-headed theories of human detectives, and there is no good reason why it should not go to the jury. Dogs are always candid and honest, and never on the scent of a reward, and they have no pride of opinion. "The more I know of dogs," said Madame de Staël, "the less I think of men."

NOTES OF CASES.

ACCESSION. — It is held in Powers *v.* Tilley, 87 Maine, 34; 47 Am. St. Rep. 304, that the owner of trees cut from his land by a willful trespasser, and by him manufactured into railroad ties, and sold to an innocent purchaser, may recover from the latter their value as ties, without any allowance for the increased value put upon the timber by the trespasser. This is the precise doctrine of Strubbee *v.* Trustees Cincinnati Railway, 78 Kentucky, 481; 39 Am. Rep. 251; Heard *v.* James, 49 Miss. 236; Gaskins *v.* Davis, 115 N. C. 85; 44 Am. St. Rep. 439; Franklin Coal Co. *v.* McMillan, 49 Md. 549; 33 Am. Rep. 280. But in Omaha etc. Co. *v.* Tabor, 13 Colo. 41; 5 L. R. A. 236, it was held that in trover for such conversion of ore, sold to a third person, the measure of damages is the value when first severed, less cost of raising and hauling to defendant.

It has sometimes been held that where the trespass was involuntary and under mistake, the owner should recover only his actual loss, and not the increased value bestowed by the trespassers, except that in coal cases sometimes the cost of digging is allowed to defendant. Beede *v.* Lamprey, 64 N. H. 510; 10 Am. St. Rep. 426. "The weight of authority, it must be conceded, sustains the rule that where the action is brought for damages for logs cut and removed in the honest belief on the part of the purchaser that he had title to them, the measure of damages is the value in the woods from which they were taken, with the amount of injury incident to removal, not at the mill where they were carried to be sawed. Tilden *v.* Johnson, 52 Vt. 628; 36 Am. Rep. 769, and note, 770; Herdic *v.* Young, 55 Pa. St. 176; 93 Am. Dec. 739; Hill *v.* Canfield, 56 Pa. St. 454; Moody *v.* Whitney, 38 Me. 174; 61 Am. Dec. 139; Cushing *v.* Longfellow, 26 Me. 306; Goller *v.* Fett, 30 Cal. 482; Foote *v.* Merrill, 54 N. H. 490; 20 Am. Rep. 151; Railway Co. *v.* Hutchins, 32 Ohio St. 571; 30 Am. Rep. 629"; Gaskins *v*, Davis, 115 N. C. 85; 44 Am. St. Rep. 439, and notes, p. 444; 25 L. R. A. 813. To same effect: Ross *v.* Scott, 15 Lea. 479; Forsyth *v.* Wells, 41 Pa. St. 291; 80 Am. Dec. 617; Coal Creek M. Co. *v.* Moses, 15 Lea. 300; 54 Am. Rep. 415; Barton Coal Co. *v.* Cox, 39 Md. 1; 17 Am. Rep. 525; Blaen Avon C. Co. *v.* McCulloh, 59 Md. 403; 43 Am. Rep. 560; Franklin Coal Co. *v.* McMillan, 49 Md. 549; 33 Am. Rep. 280; Waters *v.* Stevenson, 13 Nev. 157; 29 Am. Rep. 293; Austin *v.* Huntsville Coal & M. Co. 72 Mo., 535; 37 Am. Rep. 446. But this has been denied: Isle Royal Mining Co. *v.* Hertin, 37 Mich. 332; 26 Am. Rep. 520; Hazelton *v.* Week, 49 Wis. 661; 36 Am. Rep. 796. And in Gaskins *v.* Davis, *supra*, it was held that the increased value added by the drawing of logs to mill belongs to the owner. In Wooden-ware Co. *v.* United States, 106 U. S. 432, the rule is stated to be that if the trespass was willful the trespasser is liable for the value at time of demand or suit, but if not willful, the trespasser or an innocent purchaser from him is entitled to a deduction for the increased value which either has bestowed upon the property; if the defendant is an innocent purchaser from a willful trespasser he is not entitled to any deduction therefor. Per Miller, J.

GAMBLING — RACE FOR A PRIZE. — The Supreme Court of New York, first appellate division, have held, in People *v.* Fallon, that a running of horses for a prize or premium offered by a third person is not gambling. The Court said: —

"At the time of the adoption of the Constitution, and for many years before, it had been held that the racing of horses for purses, prizes or premiums, which were not contributed by the owners or drivers of the horses, was not a race for a bet or stake, so that it was illegal under the prohibition of the Revised Statute (1 R. S. 672, 55; Harris *v.* White, 81 N. Y. 532). The Court expressly held in that case that there is a distinction between the words bet or wager, and that which is conveyed by the term, purses, prizes and premiums. As is said, a bet or wager is ordinarily an agreement between two or more, that a sum of money, in contributing which all agreeing take part, shall become the property of one of them on the happening in the future of an event at present uncertain. There is in them an element which does not enter into the purse, prize or premium, namely, that each party to the bet gets a chance of gain from the others, and takes a risk of loss of his own to them. One or the other thing must necessarily occur.

"A prize or premium is ordinarily something offered by a person for the doing of something by others, in a contest in which he himself does not enter. He has not a chance of gaining the thing offered, and if he abides by his offer he must lose it and give it to some one of those who contest for it. In a wager or bet there must be two parties, and it is known before the happening of the event that one of them must lose or win. In the giving of a premium there is but one party who can lose, and those who enter into the contest cannot by any possibility lose, although one of them may win. A premium is a reward or recompense for some act which is done. A wager is a stake

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upon a certain event. The distinction between them is clear, and it has been adopted, so far as we can discover, in every case in which the question has been raised in this country (Alvord *v.* Smith, 63 Ind. 58; Porter *v.* Day, 71 Wis. 296; De Lier *v.* Plymouth Co. Agr. Soc. 27 Iowa, 481; see, also, Costello *v.* Curtis, 30 Weekly Dig. 20). No one would dream that the offering of a premium upon the result of a rowing match or for a contest in oratory was gambling within the plain meaning of the words, as they had been understood before the passage of the constitutional amendments. Neither was it ever suggested that the numerous prizes which are offered for excellence in draft horses, or saddle horses, or for one who turns the best furrow, are obnoxious to the prohibition of the Constitution, and yet these offers stand upon precisely the same footing, and are within the same principles as the offer of the premium or prize to be competed for by the racing of animals. The fact that the owner of each horse who proposes to compete in the race is required to pay an entrance fee, does not make the transaction a bet or a gambling transaction. The money is paid for the privilege. When paid it becomes the absolute property of the association. The person paying it under no circumstances can have it again, and whether he wins or loses, or, indeed, whether his horse competes or not, is a matter of no importance, for in no event is the money to be returned to him. He simply pays a certain sum for the privilege of competing, and that sum so paid is not to be returned to him in any event, and he has no claim upon it after it once becomes the property of the association."

This decision is supported by Misner *v.* Knapp, 13 Oregon, 279; 57 Am. Rep. 6; but Comly *v.* Hillegas, 94 Penn. St. 132; 39 Am. Rep. 774, is to the contrary.

WOMEN AS LAWYERS. — In Ricker's Petition, 66 N. H. 207, just published, it was held that a woman may be an attorney-at-law. The case was argued for the petitioner by Miss Lelia J. Robinson, now dead, and the opinion was given by the late Chief-Justice Doe, six years ago. The opinion is one of the Chief's old-timers, covering some fifty pages, and consists largely in extracts from other judges' sayings. Much of it is devoted to consideration of the question whether a lawyer is a public officer — which the Court answer in the negative. We have stated above the substance of the head-note. But the opinion closes with this: "When the petitioner furnishes the evidence required by the rules, the question of her admission to examination will be considered." What! all over again? This volume contains another opinion by Doe, C. J., covering nearly thirty pages. Carpenter, J., also emits one of thirty-two pages, on a little question of challenge of juror for preconceived opinion. A large part of this volume is given up to arguments in full of counsel, covering thirty pages in one case.

PREVIOUS CHASTE CHARACTER. — In Norton *v.* State, 72 Miss. 128, it was held that, although not in terms so provided, it is essential to the offense of seduction under promise of marriage that the woman be unmarried and of chaste character at the time of the intercourse. This is founded on the fact that the statute punishing seduction of girls under sixteen requires that they shall be "of previous chaste character." The Court say: "Can it be possible that the legislature meant that the girl under sixteen should be required to show 'previous chaste character,' but the experienced nymph du pavement" ("French of atte-Bowe") "not? That the prostitute can invoke the vindicating power of the law on terms more favorable to success than the girl under sixteen? When Mrs. Quickly conceals from the lad who sails between Sir Jack's 'East and West Indies' the contents of the notes, on the ground it is not well children should know any wickedness, we have the great master of human nature raising into relief the truth universally recognized that childhood is, in the estimation of even the most hardened, the period of purity; and when we have the Supreme Court of Wisconsin telling us, 'If Joseph Andrews had yielded to the salacious solicitations of Lady Booby, as she lay naked in her bed, he would have been guilty of debauching her person, but certainly not of corrupting her mind,' we have presented to our consciousness the other picture of the woman long past childhood with chastity gone."

DEMONSTRATIVE EVIDENCE. — A literal example of this may be found in Ellis *v.* Denman Thompson, 93 Hun. 606. That was an action by a playwright against the celebrated actor for breach of contract to act his play, "Rich and Poor." The defendant had contracted to produce the play in proper form, and "to play it continuously if there was a reasonable success attending its production," and to pay the plaintiff a certain amount. The defendant played it only twice, and then abandoned it on the ground that it failed of success. On the trial the plaintiff offered evidence as to how the play was received by the audiences and the newspapers, and of the character of the criticisms, and as to whether the actors were called before the curtain and how many times, and whether the audiences applauded and how often. All this was excluded, and defendant had judgment. This is now reversed by the Supreme Court on the ground of the exclusion of this evidence. The Court say, "This was clearly proper evidence." Of course it was, just as clearly as would have been evidence that the audiences hissed and the newspapers jeered at the play.

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The Green Bag.

PUBLISHED MONTHLY, AT $4.00 PER ANNUM. SINGLE NUMBERS, 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

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

LEGAL ANTIQUITIES.

COKE, in the preface to his Third Report, gives as a reason why the early statutes were not written in English: "It was not thought convenient to publish those or any of the Statutes enacted in those days in the vulgar tongue, lest the unlearned by bare reading without right understanding might suck out errors, and trusting to their own conceit might endanger themselves, and sometimes fall into destruction."

FACETIAE.

IN an altercation between counsel and the judge, the judge, after several attempts at conciliation, remarked: "Well, I have done all I can to promote peace, but the result reminds me very much of the fable of the old man and the ass."

The counsel, with visible irritation in his countenance, wished to know which of those entities applied to him.

"Neither in particular," was the reply; "but, considering our respective ages, you cannot object to my saying that I am the old man."

ROBERT STARK was a well-known member of the South Carolina Bar, and many good stories are told of him. When first admitted he was rather an unpromising beginner at the law. On one occasion he was defending a client charged with assault and battery. In the course of the trial, Mr. Carnes, the County Attorney, remarked, "May it please your Honor, I don't believe the young gentleman (Stark) knows what an assault and battery is." Stark, shaking his fist in Carnes's face, said: "That is an assault"; and following it with a full blow above the eye, said: "That is battery." Carnes, rubbing his forehead, sat down, exclaiming: "I did not think the fellow had so much sense."

In the office of solicitor he was a terror to all evil-doers. At Barnwell, on one occasion, a party had committed some heinous offense and fled the State. His death was subsequently announced in the newspapers; his wife administered on the estate, and at court she appeared in her mourning weeds. Mr. Stark disregarded all this matter, and at court was seen swearing his witnesses and sending the bill to the Grand Jury. The late Col. Hargood said to him: "Surely, Mr. Stark, you are not indicting *a dead man?*" "Dead or alive, I'll have him," was the reply. And sure enough, at the next court, the supposed dead man appeared to answer to the indictment.

AN Irish judge tells the following story of one of the juries in the south of Ireland, where he was trying a case. The usher of the court proclaimed, with due solemnity, the usual formula: "Gentlemen of the jury, take your proper places in the court!" whereupon seven of them, instinctively, *walked into the dock.*

LAWYER. — "What is your gross income?"
WITNESS. — "I have no gross income."
LAWYER. — "No income at all?"
WITNESS. — "No gross income; I have a net income. I am in the fish business."

"DID any man ever yet make anything by opposing a woman's will?" exclaimed a miserable husband. "Yes, I have made a good deal out of that sort of thing," answered his brother Richard. "But, Dick," responded the other, "you are a lawyer, and the women whose wills you oppose are always dead."

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NOTES.

In a patent case in the Northwest involving the Hartshorne Shade Roller patent, a poetically inclined attorney for the defence set up, as an anticipation of the patent, the fact that years before it was applied for,

> "Night drew her sable curtain down
> And pinned it with a star."

The fact that she had to *draw* it down and was obliged to pin it to make it *stay* down, clearly indicating that there was a spring at the top tending to roll it up.

But the court disposed of the matter in short order, saying that he didn't want any "high rollers" in his court.

The income of Athens from fines appears to have been considerable, and to have constituted a singular and permanent feature of the fiscal policy of the state. Its method of assessment may be best illustrated by examples. Thus, if duly authorized officials did not hold certain assemblages, according to rule, or properly conduct the appointed business, they had each to pay a thousand drachmas ($200). If an orator conducted himself indecorously in a public assembly, he could be fined fifty drachmas ($10) for each offense, which might be raised to a higher sum at the pleasure of the people. A woman conducting herself improperly in the streets paid a similar penalty. If a woman went to Eleusis in a carriage, she subjected herself to a fine of a talent ($1,180). In the case of wealthy or notable persons, fines for omissions or commissions in respect to conduct were made much greater, and so more productive of revenue; and there were very few notable or wealthy citizens of Athens who under the rule of demagogues, and through specious accusations of offenses against the state or the gods, escaped the payment of heavy fines; the experiences of Miltiades, Themistocles, Aristides, Demosthenes, Pericles, Cleon, and Timotheus being cases in point. Every person who failed to pay a fine owing to the state was reckoned as a public debtor, and was subject to imprisonment and a practical denial of citizenship; Miltiades, the victor at Marathon, for example, having been cast into prison (where he afterward died) through an inability to pay a fine assessed against him of fifty talents. — *From Taxation in Literature and History, by* David A. Wells, *in Appletons' Popular Science Monthly for March, 1896.*

Lawyers who read New York newspapers may have been impressed with the levity with which its courts treat the examination of jurors on challenges. Edward Hall, a clerk of the Recorder's court of that city, narrates that many business men, finding that the formation of an opinion will incapacitate service and save a fine, are especially ready to form an opinion on the merits of a notable case so as to escape the panel and detention from business. In a recent murder case that would be likely to last many days, he says that a juror, being challenged by the defence, glibly answered, "Yes, I have formed an opinion as to the guilt or innocence of the accused." "And when did you form it?" asked the cross-examining prosecutor. "This morning, and since I came into the court-room."

But Congressman Daniels, who previously served during a quarter century as a Supreme Court Judge in New York, caps that incident by narrating that a juror challenged once before him, after stating that he had formed an opinion, was asked by himself on the bench, "upon what did you base that opinion?" When the juror answered, "When I saw the counsel for the prisoner quarrelling so about the kind of men they wanted on the jury, I formed the opinion he must be guilty to their own knowledge, or they would not have cared what kind of men were sworn to try him."

> We played at love —
> A maid and I —
> Beneath the azure summer sky.
> To win her heart I thought I'd try —
> We played at love.
>
> We played at love —
> A maid and I —
> She took me up, I passed it by:
> A lawsuit now I fear is nigh —
> We played at love. — *Exchange.*

"It is wonderful how slowly the most obvious truths are perceived and admitted. The plain and simple morality of the Gospel required a revelation. Even in my day at the bar, it was the constant practice of the Orphans' Courts to allow

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a charge in administration accounts for the price of strong drink, furnished avowedly to stimulate the bidders at the sale of the decedent's effects." — Per GIBSON, C. J., in Pennock's Appeal, 14 Penn. State, 450, A. D. 1850.

WILLIAM H. SEWARD, while at the bar, before his wonderful political career began, often referred to his first case at the Cayuga County bar in his native State of New York. "I appeared for the plaintiff before a rural jury in a simple action of debt, where the facts in my favor were as clear as summer noon-day. I made therefore only a short summing up, and was followed by the defendant's counsel, who was from a near village, and well known for years in all the justices' courts. This was about all he said: 'Now, gentlemen and neighbors, are you going to let a young Auburn lawyer come down here to mystify and confuse the minds of plain people like us? And after all he didn't have much to say. Now, I shan't say nothing. I know, and you know, that the common law he has prated about isn't after all as good as common sense. The young man didn't think you knew I had it. Ha! ha! I guess as how he'll find he is mistaken. I leave the whole thing to you; and noon dinner-time has come, so I guess you needn't deliberate long before coming to a decision.' Our Judge charged strongly in my favor, but the verdict was against me, and I necessarily had no exceptions for a bill and writ of error. Ever afterwards I used to be careful about what kind of jurors I selected."

LITERARY NOTES.

AN article of great contemporary interest in SCRIBNER'S for June is Henry Norman's vivid picture of the present condition of affairs in the most crucial point in all European politics — the Balkan Peninsula, where a half-dozen little principalities are the buffer between the great powers of Europe. A few months ago Mr. Norman made a visit to this region, and this article is the first presentation of the impressions then gathered of Roumania, Servia, Bosnia, Herzegovina, Bulgaria and Montenegro.

THE BOSTONIAN for June is a remarkable example of what a magazine conducted upon the best principles can furnish for the popular price of ten cents. It is rapidly securing for itself a deserved place in the foremost rank of to-day's magazine field. The ranking article in importance still continues to be Lieut. James A. Frye's exposition on "Our Coast Defence." The fourth paper, which appears in the current issue, is accompanied by beautiful illustrations of the largest and most powerful ships of war belonging to the United States Navy. The two most timely articles, however, in the table of contents, are those entitled "The Growth of La Fiesta in California," by Mabel C. Crafts; and "San Antonio; Its Battle of Flowers and Its Missions," by James D. Whelpley.

THE metric system, which has recently been before both Congress and the British Parliament, is discussed by Herbert Spencer in a series of letters in Appleton's POPULAR SCIENCE MONTHLY for June. Mr. Spencer vigorously opposes the further spread of the system, and points out the advantages of one based on the number twelve.

THE complete novel in the June issue of LIPPINCOTT'S is "From Clue to Climax," by Will N. Harben. It is a tale of murder and hypnotism, in which an extremely able detective and a physician of the new school join forces to clear the innocent and run the guilty to earth.

CHARLES DUDLEY WARNER, in the "Editor's Study" of HARPER'S MAGAZINE for June, discusses the question of common-school education in the United States, reaching a conclusion not very complimentary to the public-school system. Mr. Warner's obvious comment upon the situation is, "School education should be in the hands of experts, not of politicians, not of reformers, not of men and women elected by popular vote."

THE Lincoln paper in MCCLURE'S MAGAZINE for June describes Lincoln in his familiar, every-day relations with his family, friends and neighbors, at the time of his return to Springfield after serving a term in Congress. It contains a number of new facts and anecdotes, and presents Lincoln in one of his most attractive aspects. The paper is fully illustrated.

THE necessity for a court of criminal appeals in the United States is, in the opinion of the Hon. I. C. Parker, Judge of the U. S. District Court for the Western District of Arkansas, of the most urgent character, his reasons being clearly and forcibly presented under the title of "How to Arrest the In-

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crease of Homicides in America," in the North American Review for June.

The June Arena opens its sixteenth volume, appearing in a new dress, and being printed by Skinner, Bartlett & Co. It is an unusually strong number, opening with a brilliant paper by Rev. Samuel Barrows, D.D., the distinguished editor of the "Christian Register" of Boston, on "The First Pagan Critic of Christian Faith and his Anticipation of Modern Thought." Justice Walter Clark, LL.D., of the Supreme Bench of North Carolina, contributes an instructive and delightful paper on Mexico, the interest of which is enhanced by several excellent illustrations, including a recent portrait of the President of the Mexican Republic. The President of the Mercantile National Bank of New York contributes "A Proposed Platform for American Independents for 1896."

The June Atlantic begins with another installment of the letters of Dante Gabriel Rossetti, edited by George Birkbeck Hill. This installment contains the letters for 1855. Striking features in this issue are an article upon "The Politician and the Public School" by Mr. G. L. Jones, superintendent of schools, Cleveland, Ohio, and "Restriction of Immigration" by President Francis A. Walker.

Mr. J. B. Bishop, one of the editors of the New York "Evening Post," has contributed to the Century for June a timely paper of political anecdotes, "Humor and Pathos of Presidential Conventions," in which he sets forth the attitude of many candidates for the Presidency at the time of their defeat. Among the topics of the paper are "The First 'Dark Horse,'" "Convention Sayings," "Modern 'Stampede' Tactics," and there are entertaining details concerning Clay, Webster, Seward, Greeley, Blaine and others.

BOOK NOTICES.

LAW.

Green's Encyclopædia of the Law of Scotland. Edited by John Chisholm, M.A., LL.B. Vol. I. Abandoning to Banker's Lien. William Green & Sons, Edinburgh, Scotland, 1896.

The design of this work is to give in a condensed but at the same time adequate form a complete statement of the law of Scotland. A number of able writers contribute important chapters and articles. The editor appears to be well qualified for his portion of the work, and these volumes will prove of great value, not only to the Scottish Bar, but to the profession at large.

Life and Letters of Oliver Wendell Holmes. By John T. Morse, Jr. Houghton, Mifflin & Co., Boston and New York, 1896. Two vols. Cloth. $4.00.

Dr. Holmes could have had no better biographer than Mr. Morse, who enters upon his work *con amore* and gives us a most delightful insight into the life of this most delightful of men. The author's apology for devoting so much space to narrative is unnecessary, for all readers will agree with us that there is not a dull or uninteresting line in either volume. The work is fully and artistically illustrated.

The American Probate Reports. Vol. VIII. Containing recent cases of general value decided in the courts of the several States on points of probate law. With notes and references by A. A. Greenhoot, of the New York Bar. Baker, Voorhis & Co., New York, 1896. Law sheep. $5.50 *net*.

These reports contain "the cream" of probate law and are of exceeding value to probate lawyers, executors, and administrators. The notes and annotations are full and extensive. An index-digest of volumes 1 to 8 is given in this volume.

Marketable Title to Real Estate. Being also a treatise on the rights and remedies of vendors and purchasers of defective titles, including the law of covenants for title, the doctrine of specific performance, and other kindred subjects. By Chapman W. Maupin of the Washington, D. C., Bar. Baker, Voorhis & Co., New York, 1896. Law sheep. $6.50 *net*.

This treatise is a complete exposition of the law on the subject of defective titles. The author has found a really new subject, one that has never been covered by any American publication, and one that is of the utmost importance. There are few more prolific sources of litigation than the disputes growing out of defective titles, and this work will save counsel the labor of referring to half a dozen or more text-books on different subjects. The index is full and carefully prepared. Altogether this treatise is one of the most valuable additions to legal literature which we have had for a long time.

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WILLIAM SAMPSON

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The Green Bag.

VOL. VIII. No. 8. BOSTON. AUGUST, 1896.

WILLIAM SAMPSON.

BY IRVING BROWNE.

THERE are various Sampsons immortalized in the dictionaries of persons, real and fictitious. There is the servant of Capulet, in "Romeo and Juliet"; and the "Dominie" of "The Antiquary"; and Deborah, who "fit into the Revolution," like the great judge of Israel; and an American D. D.; but William makes a very small figure in such repositories. It is his own fault. He was a lawyer, and evidently did not furnish his biography and pay for a portrait to accompany it in any biographical dictionary of his day, if indeed such oppressions and impositions had then been invented. To render his resuscitation the more difficult, the only extant records of him easily accessible, to my knowledge, are reprints of two of the rarest of New York law reports. Such is professional fame. Even tradition has very little to say about him. He lives in this intangible and ghost-like way, simply because so much wit could not die. Of all legal wits of whom there is any account, he was the brightest, and among all the wits of earth there can never have been his superior. He had wit enough to have set up a dozen "Punches," and to have added a brighter gleam to "Life." Neither Sydney Smith nor Rufus Choate could have discoursed so long and so amusingly as he did, on at least two occasions, and it is to these two discourses that I now venture to draw the attention of the rising members of the legal profession. He is known by tradition to all the old New York lawyers now living, to some of the middle-aged, and not at all to the young. Even when the roll of the lawyers who conferred glory on the New York Bar eighty years ago is called on festive occasions, his name is not mentioned. There is no mention of him in any of the histories of the city of New York, nor in Dr. Francis' celebrated address, "Old New York," before the New York Historical Society. Perhaps this is because he appears to have been merely a criminal lawyer, if we may judge from the few extant legal records of him. He was an Irishman, but fame has not been so kind to him as to his contemporary and fellow-countryman, Emmet, and his later fellow-countrymen, O'Conor and Brady. Yet in general culture and legal learning he could have held his own with any of them, and he had more wit than all of them together. There is probably not a living lawyer who ever saw him. No Bar meeting seems to have been held over the ashes of this Yorick. Mr. Snyder has not embalmed any utterance of his in "Great Speeches of Great Lawyers." It seems to be left to me to drag his memory out of the grave and furbish it up for his neglectful successors. In performing this pious and pleasing office, would that my pen might gather inspiration from his blithe spirit, which irradiates the musty old law pages and confers a glory on the mouldering sheepskin!

The chief data of his life, so few as I can discover, are in Appleton's "Biographical Encyclopædia" and singularly, in Allibone's "Dictionary of Authors." He was born in Ireland in 1763, and died at New York in 1836. He was an exile, tried for complicity

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in the rebellion of 1798; was released on condition that he should go to Portugal, which he did; there he was imprisoned at the instance of the British Government; he escaped into France, and thence came to England and defied the government, and was allowed to depart for the city of New York, where he landed, very appropriately, on the fourth of July, 1806. In 1825 he removed to Georgetown, D. C. More than one hundred of the most eminent lawyers and judges of New York united in a letter of regret at his removal, with a strong expression of their respect for his "attainments, genius and virtues." Gov. De Witt Clinton and Chancellor Kent sent him special letters of regard. A volume of reminiscences written by him was published in 1807 at New York, and a second edition was published at Leesburg, Va., in 1817, and reprinted in London in 1832. He was perhaps the earliest of our lawyers who raised his voice in favor of codification, and there is extant an address delivered by him before the New York Historical Society on the Common Law, which, with his correspondence, newspaper articles, and other addresses on this topic, was published in Washington, in 1826, by Fisbey Thompson. Among his published writings is a pamphlet on the "Catholic Question in America"; another entitled, "Is a Whale a Fish?" and reports of the trials of Cheetham, Renshaw, Maurice and Niven. Samuel Woodworth, the author of the well known poem, "The Old Oaken Bucket," published in New York, in 1811, a sextodecimo of one hundred and four pages, entitled: "Beasts at Law, or Zoologian Jurisprudence. A Poem, Satirical, Allegorical, and Moral. In Three Cantos, Translated from the Arabic of Sampfilius Philœrin, Z. Y. X. W. etc., etc., whose Fables have made so much noise in the East, and whose fame has eclipsed that of Æsop. With Notes and Annotations." This is a trial by the beasts, under Latinized names, of Canis for an assault on Capra. Both are brought in guilty, and are whipped by the ape. It is a heavy as well as a somewhat broad performance, the satire of which is imperceptible at this day.[1]

I am indebted to the Honorable Charles P. Daly of New York, the oldest surviving lawyer of that city, for information as to Sampson's writings. He corrects the statement in Appleton's Biographical Cyclopædia that "Sampson among the Philistines, or the Reformation of Law Suits," Philadelphia, 1805, was from Sampson's pen. It was by William Duane, editor of the *Aurora* newspaper, to which Jefferson attributed his election to the presidency. He also doubts the statement in the same Cyclopædia that Sampson acquired a large practice in New York. This venerable and accomplished gentleman delivered before the Law School of the New York University a lecture on the common law, in which he showed what part Sampson took in bringing about the reform which led to the adoption of the Revised Statutes of 1830. He informs me: "I do not recall that he suggested any one of the valuable changes made by the revisers in our law, unless it might be in a very general way, and the impression left upon my mind by his writings is an undiscriminating attack on the common law, that was quite as objectionable as the prior indiscriminate laudation of it. But it is by agitators like him that the public mind is finally aroused and important changes are brought about."

In the address above mentioned Judge Daly observes, in speaking of Sampson's Address on the Common Law: "So far from being, as its title would indicate, an attempt, by a competent legal historical investigator and critic, to explain what the common law was, or pointing out its defects, and suggesting how they could be remedied, it was the production of a fluent rhetorical writer, denouncing the common law as a system wholly unsuited to our republican government, ignoring or probably ignorant of how much we are indebted to it

[1] **Chief-Justice Daly, after a critical examination, comes to the conclusion that this is the work of Sampson himself.**

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for our free institutions, and that it was the attempt of George the Third and his ministers to deprive the colonies of rights and liberties which they insisted — and justly — were secured to them by the common law, that led to the War of Independence and the final separation of the colonies from Great Britain. How limited the author's knowledge of it was as a whole will appear by a single passage in which he says that Blackstone, with all his eloquence and grace, could not make that a science which was reducible to no fixed rules or general principles; but the more, he says, 'as the sunny rays of his bright genius fell upon it, the more its grotesque forms became defined; the more they proved to be the wild result of chance and rude convulsions'; and delivered other derogatory opinions of it, with that highest of all confidence, the confidence of ignorance. The address however produced an effect. The editor of a weekly paper at the time declared that it electrified the public mind. It was made the subject of an article in the 'North American Review,' was noticed in England and in France, and may be regarded as the beginning of the movement in this State that led within a decade thereafter to the enactment of the Revised Statutes. What it urged was felt to be necessary — a thorough revision and reconstruction of the entire system then existing in this State; and Sampson kept up the agitation for it by speeches at public dinners, and by inserting in the newspapers articles written by himself, and letters sent to or received from prominent men on the subject; the general effect of which was to bring the common law into great disrepute in the State, especially among those lawyers who knew the least about it," etc.

Hoffman, in his "Legal Study," says that "Sampson may justly be regarded as the great promoter of all the legal amendments, the codes, and consolidations that have so far taken place among us. His invectives, however, against the common law were often injudicious and indiscriminately severe."

With deference to such eminent authorities, I must say, that although his invective is severe, I do not discover that it is ever launched at anything good or even endurable, but on the contrary it seems to be aimed at utter abominations, barbarisms, and superstitions, which no lawyer of this day would dream of defending. It may be that he did not praise what was good in that law; that was not his purpose; but this is no ground for saying that his censure was injudicious. That adjective would not apply to denunciation of Baal or Moloch, and the things that Sampson reprehended were not much better. One might as well censure Luther for not having lauded the Catholic church for the good things in its religion, when his mission was to root out the bad. It is also evident that the things for which the common law has been so much praised are not legal, but are political. The four principal bases of modern freedom, habeas corpus, trial by jury, and the inviolability of property from public seizure, except by due process of law, and representation of the taxed, are political rather than legal measures. That which Sampson aimed his shafts at was the customary common law, pertaining to private rights, the faults of which were numerous and glaring. Sampson was an agitator, a reformer and a radical, and if his spirit takes note of earthly affairs, it must be soothed by the disappearance of the common law from England as fast as statute-makers can accomplish it, and by the abolition of many of its absurdities in his own State.

I have read the address in question, and extracted the following, as apparently the very first words favoring codification uttered in New York: —

"If the experiment had never before been made of a judicial code, substituted in the place of antiquarian legends, usages and customs, we might fear to engage in an untried and hazardous undertaking. If no attempt had ever yet been made to reduce to a body of written reason the scattered fragments of a nation's laws or usages,

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or if when such attempts were made, disorder and mischief had constantly ensued, we might take warning from such examples. If no wise jurists had ever recommended the digesting and new ordering of the law, there might be temerity in the proposal, but Hale and Bacon have not only approved, but offered their views and plans. And are not our own written statutes periodically revised? Why not that part of our laws which rests upon less solid evidence? It has been the first glory of the greatest sovereigns and the best policy of the wisest people. The most celebrated law-givers have traveled into all regions where early civilization had left its luminous traces, to gather the chosen flowers and fruits of every clime. If the fathers of our Revolution, at the peril of much more than life, of all the vengeance that offended power can visit on the unsuccessful patriot, dared to uproot the three great pillars of the common law, the monarchy, the hierarchy and privileged orders, shall we stand in superstitious awe of unlaid spectres, shall we still be amused by nursery tales, and tremble at the thought of innovations upon institutions which their admirers themselves assimilate to the practice of the Gentoos, the Mexicans, and the children of the Sun; which have not half the imposing dignity of those of our ancestors, the red men of the Five Nations, as may be seen by any one who will read the account of them by Mr. Colden[1] and compare it with the uncouth manners of the Saxon Heptarchists. It is true, at the same time, that the English reports contain, amidst a world of rubbish, rich treasures of experience, and those of our own courts contain materials of inestimable worth, and require little more than regulation and systematic order. This with fixing and determining the principles on which they ought to depend, and settling by positive enactments all doubts that hang upon them, abolishing forever all forms that impede the march of justice, and firmly establishing those which are needful to its ends, and translating into plain and intelligible language those borrowed, ill-penned statutes, of which every word gives rise to endless commentaries, will complete the wished-for object. Particular cases will not then be resorted to instead of general law. The law will govern the decisions of judges, and not the decisions the law. Judgments will be *legibus non exemplis*. And it will not be necessary that at least one victim should be sacrificed to the making of every new rule, which, without such immolation, would have no existence."

[1] See The Cordwainers' Trial, New York, 1816.

Sampson's "Memoirs" is a very readable book. It gives an account, in the form of letters, of his romantic and dangerous adventures, by land and sea, of his imprisonments, and shipwreck, and sufferings, of his cruel separation from his family, and of his final embarkation for America, whither he went by invitation of his uncle Sampson, "to inherit a pretty rich estate, which he possessed in that county of North Carolina which still bears his name." These pages give us a vivid idea of this gay, vivacious, ingenious, and indomitable Irishman. Variously cultivated he seems to have been, for he played on several different instruments, and was something of an artist. He drew portraits and designs in charcoal on the walls of his prison. When in prison, in Portugal, he played on his flute, to the edification of an opposite neighbor, a young lady, who danced to the music; and out of some sticks, which he begged from a mule-driver, he constructed a bow and arrows, by means of which he shot letters to her, describing his situation, and asking her intercession. He gained a view of his jailer's room overhead, by tying a shaving mirror on the end of a stick, and holding it out of the window. He also hollowed out an orange-rind, and enclosing an epistle, lowered it from his window with a thread unravelled from a stocking. The highflown strain of old-school gallantry, in which these episodes are written, is very charming. Something (but not much except in length) of a poet, too, for he here prints forty-six quatrains, eights and sevens, and eights, entitled, "Hope and the Exile, a Vision." The book has acute observations on the French. Sampson seems to have been gallant, — being Irish he could not well be otherwise — for he introduced his observations on the French women as follows: "What a subject, O Jupiter! What muse to

invoke! What colors to employ! Who is he that can describe this whimsical, incomprehensible, and interesting being?"

Among the scarcest New York law reports is "Select Cases, adjudged in the courts of the state of New York. Vol. 1, containing the case of John V. N. Yates, and the case of the Journeymen Cordwainers of the City of New York, N. Y. Printed and Published by Isaac Riley, 1811," a small octavo, of 278 pages. The volume was republished in 1883, in a larger page, under the erroneous title of "Yates' Select Cases." It is truly "selected" in the number of its cases. The first is habeas corpus in a contempt proceeding against a master of the court of chancery, for having instituted and conducted a suit in the name of a solicitor of the court, contrary to the statute, in which Yates and Spencer, J. J., were for discharging the prisoner, and Kent, C. J., and Van Ness and Thompson, J. J., were for remanding him. (This case is also reported in 4 Johnson, 317.) The second was an indictment for conspiracy not to work for any employer who employed any workman who was not a member of the society, or who should refuse to pay the rates of wages adopted by them, and to prevent others from so working. The case was in the general session, in 1809, presided over by De Witt Clinton, mayor, sitting with two aldermen, and the arguments of Sampson and Colden, for the defendant, and Emmet, Riker, and Griffin, for the people, are reported. Seldom has a case been so well reported or displayed such ability on the part of counsel. This is the leading case of conspiracy in this country. The law of conspiracy was then comparatively little developed or understood in this country. Only one American case was cited. Sampson's argument, covering some ninety pages, is a model of research and logical acuteness, is ablaze with wit, and gives the most formidable exposure of the crudeness and barbarity of the ancient common law to be found in the books. In attempting a synopsis of this brilliant argument, the difficulty is in determining what to omit rather than what to include. What can be more elegant than his statement that the statutory "definition of what shall be a conspiracy is a declaration of what shall not be so," as "the line of circumference shows as well what is contained within a circle, as what falls without it?" How true and masterly is his distinction between the foundation of the English laws, and that of our own! "The English code and constitution," he says, "are built upon the inequality of condition in the inhabitants. Here all are in one degree, that of citizens, and all are equal in their rights. There are many laws in England which can only be executed upon those not favoured by fortune with certain privileges; some operating entirely against the poor. There one man is sovereign, and all others his subjects. Here no man is subject, and no man lord or master. Why should we then take lessons of prosperity or felicity of other countries? If they do not take them from us, let us at least remain contented with our own institutions, and wean our affections from such as are of no kin nor profit to us. But how strangely are men the creatures of education and habit! At the same time that we have shaken off the supremacy of the English law, we embibe its errors with our mother's milk." How delightfully he then chaffs Emmet! "And I call upon my adversary, that great legal antiquarian, my learned countryman, who lives amongst the old fathers of the law, who estranges himself from his friends, his wife, and lawfully begotten children, to haunt with such musty companions. I call upon him who spends his mornings with Sir George Croke, and Sir Harbottle Grimstone, and his evenings with Mirror of Justice, and Javaise of Tilbury, to tell me of any case of this nature prior to those statutes. If he cannot show when it was attempted, then it never was attempted."

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He then opens an attack upon the English statutes of conspiracy and champerty: —

"They were the lineal descendants, the lawful and immediate issue, of pestilence and public calamity, and they do not hide their origin; for by them and their consequences the most useful class in England is rendered the most miserable, and grows poor as its oppressors grow rich. Throughout the habitable world, luxury, vanity, and even fancy is satiated by the production of their industry; but like the worm that spins its bowels, and perishes in the act, so they whose hands impart to the tissue its luster and its hue, to flatter the voluptuous and the gay, pine themselves, and decay in obscurity and want. . . . In a nation expending thirteen millions sterling yearly upon the instruments for the destruction of men, one million out of nine are beggars, receiving alms!!! And are these the benefits the prosecution are now, for the first time, about to visit upon our happy community? . . . If we begin to adopt these stupid acts of oppression, we shall find it difficult to stop. There are others of the same family, so connected in kind, that they hang together like tape-worms — you cannot take one but you must pull all with you."

He then dilates upon the ancient trade and sumptuary laws, and of one he observes:

"It is unfortunately in that fearful jargon called *law French*, which modern men cannot pronounce, for fear of dislocating their jaws. I would as soon crack so many butternuts as pronounce so many words of it."

He goes on to speak of —

"The hardship, for instance, of *making justices*, who never labored, the judges of the poor man's labor, its intensity, and its remuneration, is not equitable. They are not, in that respect, treated as free agents; they are not judged by their peers. The qualifications of those *English* justices are no qualifications for arbitration of such kind. They may be 'most sufficient knights and esquires, with freehold, copyhold, or customary estate'; they may be 'of the place, and of the quorum.' They may be loyal men to church and state; but such will be too apt to scorn a leather apron. It is not with their back to the fire, and their belly to the table, that they can perceive the poor man's wants. When they have eaten their capon, and swallowed their sack, with their reins well warmed, and then turn round to take their nap, with their backs to the table and their belly to the fire, they are not the better qualified to judge the poor man's case. Sir *Guttle* may calculate that, if the lean rascals were to feed well, they might wax as fat as gentlemen. And justice *Drowsy* might conclude that as there was but a time for all things, if the handicrafts got more time to sleep, there would not be enough left for gentle folks. If justice *Testy* has the gout, and his shoe should pinch, it would be reason for putting all the ragamuffins in the stocks."

Then succeeds a passage of great power and eloquence.

"Shall we, then, second the intention of the oppressors? Shall we, by such prosecutions, drive from our hospitable shores those who increase our stock of industry, population, and revenue? Shall we, too, hunt the wanderers like frightened birds, that find no twig unlimed, no bough to light upon? Shall we, without law or precedent, and in the teeth of non-usage, as old as the annals of our country, rake up the embers of the *English* common law, to find a pretext for doing what never was done before, and never should be done?

"If we do this, we must do more. We must also make statutes of labourers; for these persecutions will *thin* the artisans here as the great plague did formerly in *Britain*. Like birds of passage, no longer warmed by a genial sun, the instinct of their nature will warn them to depart. Unless restrained by bolts or penalties, they will flock together, even on the house tops, and take their flight, no man knows where; not like the summer swallows, for a season and to return again; but like the vital breath, which, when it quits its earthly residence, leaves it for ever to decay and moulder, and returns no more.

"The avarice of the *Patricians* drove the people of *Rome* to the Mons Sacer. Who is the people hating *Appius Claudius* that would do so here? And if it be done, which of these sleek and pampered masters will it be, Mr. *Gorwin*, or Mr. *Minard*, that will take upon him the office of *Agrippa*, to cajole them with a parable, how he is all belly, and they all members; how his vocation is to eat and repose, theirs to work and starve.

"Let not these allusions be thought foreign to

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the point. It is by taking larger view of things that we master the little fidgeting spirit of circumstance. Such considerations are antidotes to those occasional spasmodic affections in the law, which it is important to cure in their incipiency, lest they turn, as in *Great Britain*, to a chronic malady."

He then argues that only those parts of the ancient common law and statutes as are intrinsically appropriate to the condition of this country have been adopted here.

"In vain, otherwise, would our constitution have repealed the statutes. In vain have consigned to oblivion so many remnants of antiquated folly, if ever and again some unsubstantial spectre of the common law were to rise from the grave in all its grotesque and uncouth deformity, to trouble our councils and perplex our judgments. Then should we have, for endless ages, the strange phantoms of Picts and Scots, of Danes and Saxons, of Jutes and Angles, of Monks and Druids, hovering over us like 'ravens o'er the haunted house,' or ghosts

'That inglorious remain
Unburied on the plain.'

In vain would this country advance in commerce, arts and industry; in vain science and philosophy make their abode among us; in vain propitious heaven designate with a favouring hand our station on the globe, and distinguish us by freedom and prosperity, if we mar our own destiny by such servile adherences."

(It is somewhat surprising that Mr. Sampson should have adopted the English use of the *u* in such words as favor, etc.)

"The more I reflect upon the advantages this nation has gained by independence, the more I regret that one thing should still be wanting to crown the noble arch — A NATIONAL CODE. I lament that the authors of the Revolution, wearied with toil and human waywardness, should on the very threshold of perfect redemption, have failed, like the fabled poet of antiquity, by looking back, and suffered the object of their long and ardent cares to relapse again into the empire of Pluto, and themselves to sink at length, breathless and spent, under the burthen of the common law. They might well have thought it beneath their high achievements to stay and strip the dead."

He then condescends to pleasantry at the expense of Mr. Levy, the recorder of Philadelphia, who in a recent similar case had charged the jury that boots

"Are articles of first necessity. I cannot there agree with him. When I think how many patriarchs have reached the blessed abode of their fathers, and never worn boots, how many serjeants have trod the thorny mazes of the common law and worn no boots, and how many poor poets have bestrode the fiery courser of the Muses and had no boots, I cannot think them things of such necessity. But equal justice is of first necessity, and when that is given for the sake of boots, boots are too dear." "It seems as if folly had this privilege, to be seen only at a distance, and to be invisible when it stares us in the face. We can see well enough the ridicule of the old priggish ordinances we have read from the statutes at large which fashioned men's gowns and women's fardingales by act of Parliament. We have laughed at the short mantle of Dean Gurthorpe. Others will laugh at our solemn arguments of this day. We might as well prevent parents from conspiring to marry their children, indict landlords for refusing to let their houses at the *usual rents*, or merchants from following the rates of the market."

To the argument of the learned Philadelphia recorder that a master cannot tell when to accept a large order because the workmen may make a sudden "jump" in their demands, he answers:—

"Well, if the master receives an advantageous order, much good may it do him. But if he makes a sudden jump into a coach and country seat, why shall not the poor journeyman jump after him into a clean shirt and whole breeches?" "As to the danger of the community going barefooted. I do not think it alarming. It will be a specious pretext for wearing out old shoes. The cobblers will rejoice, and some sly merchant will import a cargo from France or England. Muzzle but these prosecutions, and then before we have long gone slipshod, the masters and the men will have come to an agreement, founded, like all bargains, on reciprocal need; the one giving as little as he can give, the other taking as much as he can get."

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He deems that ancient common law laid down nothing concerning shoemakers, "for lord and lady, knight and esquire, all went barefooted; and possibly whoever lived in the days of the Druids might have counted the ten toes of her majesty the queen."

He then opens his guns on the common law:—

"In the old volumes of the common law we find knight-service, value and forfeiture of marriage, and ravishments of wards; aids to marry lords' daughters, and make lords' sons knights. We find primer seisins, escuage, and monstrans of right; we find feuds and subinfeudations, linking the whole community together in one graduated chain of servile dependence; we find all the strange doctrine of tenures, down to the abject state of villenage, and even that abject condition treated as a franchise. We find estates held by the blowing of a horn. In short, we find a jumble of rude, undigested usages and maxims of successive hordes of semi-savages, who, from time to time, invaded and prostrated each other. The first of whom were pagans, and knew nothing of divine law; and the last of whom came upon the English soil towards the decay of the Roman empire, when long tyranny and cruel ravages had destroyed every vestige of ancient science, and when the pandects, which shed the truest light that ever shone upon the English code, lay still buried in the earth."

"Thus was this *divine* system delivered down by the Druids, who, after possessing all the learning of the western parts, were sent to perfect their studies in Mona, and there became so learned that they could neither read nor write."

Then after quoting Blackstone's eulogium on the common law, he continues: —

"Now here is from the pen of the most passionate and eloquent eulogist, who had a professor's chair and a salary for praising the common law, an account of the true ancestry of this *divine system*. All I can say of it is this, that the same panegyric will apply *totidem verbis* to the institutions of our red brethren, the Iroquois. The league of the five nations is similar to that of the heptarchy. Blackstone here tells us that the Saxon heptarchy was composed of Jutes, Saxons, anglo-Saxons, and *the like;* all sprung from the great northern hive, that poured forth its warlike progeny. The historian of the five nations tells us that they consisted of so many tribes, or nations, joined together by a league or confederacy, like the United Provinces, and without any superiority the one over the other. This union, he adds, has continued so long that the Christians know nothing of the original of it; the people in it are known by the English under the names of Mohawks, Oneidas, Onondagas, Cayugas and Senecas. Here, then, is an ancestry fairly worth that of the *great northern hive.* The one had their Michell-Synoth, or Witena-Gemot; the other their sachems or counsels."

Quoting then from his associate, Colden's History of the Five Nations, that they "think themselves by nature superior to the rest of mankind, and call themselves *Ongue honwee,*" he goes on: —

"ONGUE HONWEE then say I, and away with your old barons, kings, monks, druids, your *Michell-Synoth,* and your *Witena-Gemot.* If we look to antiquity, the red men have it. If we regard duration, they have it still more, for the Picts and the Britons have long ceased to dye themselves sky-blue. The Indian paints himself for war even to this day. The one scalps the enemies of his tribe; the other burned their own women. The Saxons conveyed their lands by sod and twig; the Tuskaroras by the more elegant symbols of beaver and a belt."

He argues that Christianity must have introduced but little learning, "when the bare writing of a man's name would save him from the gallows." After pointing out the inconsistencies of the law, even in regard to right of clergy, he says: —

"When Blackstone employs his elegant pen to whiten sepulchres, and varnish such incongruities, it is like the Knight of La Mancha extolling the beauty and graces of his broad-back'd mistress winnowing her wheat or riding upon her ass"; and likens him to the hypochondriac who fancied himself pregnant, to whom his physician presented a hedgehog "as the fruit of his travail. He pressed the urchin with transport to his bosom and felt that it was prickly. He kissed it, and found its legs; he looked at it, and acknowledged that it

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had some rough and uncouth features; but he loved it because it was his own, and his fond prayer was, sweet babe, may you live forever, *esto perpetua*."

From a tremendous onslaught on the common law we have space for only a few choice passages: —

"Let us examine it," he says, "in its most essential parts, and what is it? Whatever could have been the wisdom of that law which decided upon the life and death of man by blasphemous appeals to miracles, by fire and water ordeal; by the choak bread and the holy cross; and which decided upon property by venal champions; by thumps of sand bags and the cry of craven? How does this accord with our principles and institutions, which do not admit of fighting cocks for money, much less men?"

"When is it that we shall cease to invoke the spirits of departed fools? When is it, that in search of a rule for our conduct we shall no longer be bandied from Coke to Croke, from Plowden to the Year Books, from thence to the dome books, from *ignotum* to *ignotius*, in the inverse ratio of philosophy and reason; still at the end of every weary excursion arriving at some barren source of grammatical pedantry and quibble? How long shall this superstitious idolatry endure? When shall we be ashamed to gild and varnish this arbitrary gathering of riddles, paradoxes, and conundrums with the titles of wisdom and divinity? When shall we strike from the feet of our young and panting eagle these sordid couplets that chain him to the earth, and let him soar, like the true bird of Jove, to the lofty and ethereal regions, where destiny and nature beckon him?"

"Shall all others, except only the industrious mechanic, be allowed to meet and plot; merchants to determine their prices current or settle the markets, politicians to electioneer, sportsmen for horse racing and games, ladies and gentlemen for balls, parties, and bouquets; and yet these poor men be indicted for combining against starvation? I ask again, is this repugnant to the rights of man? If it be, is it not repugnant to our constitution? If it be repugnant to our constitution, is it law? And if it is not law, shall we be put to answer to it?"

Then he examines the passage from Hawkins relied on as the basis of the law of conspiracy, points out that it is not found in the original edition, but has been "interlarded in small type" by later "note-mongers," and "extracted from the worst book of English reports (8 Mod.) under which the shelf groans," called by Burrows "a miserable bad book," and said by him to have been "treated with the contempt it deserved."

At this point the court, being "obliged to attend the sitting of the board of common council," adjourned till next morning, when Sampson went on with a wonderfully learned and acute examination of the authorities cited in the margins of Hawkins, and the more modern cases, and concluded in a strain of virility and nobility worthy of Erskine. Blazing wit, withering sarcasm, words that sting like a lash and cut like a sword, the deepest acuteness of logic, the broadest and most beneficial views of society, the most fervid philanthropy, mark this extraordinary production. After this his associate Colden seems dull, and the wisest part of his adversary, Riker's, reply is that in which he acknowledges Sampson's "wit, vivacity and subtilty." Emmet followed to better purpose, but merely furnished Sampson for a second opportunity, in which he gave the common law another fearful scoring, vindicating himself against the charge of having "blasphemed the temples of barefooted Druids in arguing here for working shoemakers."

"I have not treated with becoming reverence," he said, "the trial by the corsned, wherein the life of man, his guilt, his innocence, were made to turn on his salival glands; and he was only innocent who could best masticate and swallow a lump of dough, and not be choked with it. I have spoken disrespectfully of trials by the holy cross, a game not half so fair as blind man's buff, on the success of which death and eternal infamy awaited. I have not reverenced that trial by hired bruisers, who by thumps of sand bags were to try whose cause was holiest in the sight of God, where he alone was justified from violence and malice, whose champion thumped his enemy to death, or till he cried out *craven*, or he who could endure

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such thumping from sunrise to sundown and not cry craven; that also proved the innocence of him who hired the body to be thumped. I have not spoken with religious awe of cudgel playing, that ancient mode of duelling by battel, when the lord or knight who had the broadest back and thickest skull was sure to turn out the elect of God, and have his adversary hanged for being beat."

"I have spoken rashly of that *judicium Dei*, called the ordeal; where guilt or innocence was proved, according to the rank of the accused, by fire or water, in person or by deputy; persons of *high condition* judged innocent if they could hold three pounds of red hot iron in their hands, or walk barefoot and blindfold over nine red hot ploughshares.

"I have made too free with that most righteous trial, where, for small offences, the hand was plunged in boiling water; for capital ones, the arm up to the shoulder; that is to say, where a fore quarter of the man was boiled to try the fact whether the rest was good; when he whose flesh could not resist the boiling caldron was put to death. Of these and all such things, I have spoken too disrespectfully; because these sublime doctrines are to be found not only in the laws of 'Ina,' the 'Mirror,' and in 'Bracton,' but in more modern works laid down as law."

Returning to the passage attributed to Hawkins, but derived from 8 Modern, he insists "that the modern authorities are nothing more than echoes of one single error," referable to "that miserable book," which "ought to be weeded out of our libraries as a very rank weed which scatters its bad seeds, and has already overrun the soil and choked all reason. The gentlemen, in their round of references, have driven us, as Tony Lumpkin drove his dear mamma, so many turns round Crackscull Common, still never quitting the point he started from." "The numerous references of the learned gentlemen mean no more than what a merchant does when he draws his bills per duplicata, triplicata, quadruplicata, and so on, they being all referable to one single case, and that, in point of credit, no better than a blank endorsement. What is it all but pouring from vial into vial, unless it be that they have shaken the bottle and raised up all the dregs that had precipitated to the bottom?"

Passing to another authority he continues:

"This wonderful compilation of the learned Mr. Wentworth, with all its labyrinths of indexes and apologetic prefaces, in which the author seems to accuse the dulness of mankind for not comprehending his methods and his meanings, and which has caused more nervous headaches than tobacco or strong drink, is called a very high authority. Pile the ten volumes upon one another, like 'Pelion upon Ossa,' it is breast high, but otherwise it is no higher than the sun after he sets and leaves the world in darkness. Call it deep, or call it dark, but never call it high."

His antagonists having cited Bolton's Justice, he demolishes it by citing from it the record of a conviction of "a most wicked widow" who "did, with her English charms and enchantments, so inthral a proud, milkwhite steed in so diabolical a manner that he pined and languished," and was condemned to imprisonment for a year and every quarter to stand six hours in the pillory.

Of course, two such Irish patriots as Sampson and Emmet must lug in Ireland and her woes and their causes, and Sampson having detected some incongruity between Emmet's argument on this trial and some opinions in Emmet and MacNevin's "Pieces of Irish History," thus dresses down his compatriots: —

"I have read of Cato, the censor, to whom (for the best features of his character, his simple integrity and his successful eloquence) I may compare my friend, that he had two mantles. The one he put on when he went to the forum; that was for splendour and parade. When he retired to the bosom of his family, he slipped that off and covered himself with one more simple, which I shall call his mantle of peace. There in the bosom of his family he was again himself. No doubt he often did and said for the clients he protected what no private interest could ever have urged him to say for himself. Such is the

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nature and office of an advocate. To show that this is true, I shall resort to no other proof than his own words." (Quoting from the book.) "What the counsel has said there in the warmth of his argument, was spoken by Cato, the advocate of his clients; what is written in this book is written by Cato, the good citizen, the enemy of oppression, and the well tried patriot. Here spake the advocate, but there the man."

Such is a very inadequate summary of this superb argument against the criminality of a mere combination not to work or an agreement for non-feasance. It is a pity that it should have been in a measure wasted, for the Court having paid, "a handsome compliment to the industry and ability of the counsel on both sides, deferred its opinion till the ensuing session"; Mayor Clinton then not being present, and the aldermen not agreeing, it went over again; then Mayor Radcliff was in office, and a special term was appointed to hear it again, at which were present the new mayor, recorder Josiah Ogden Hoffman and alderman Nicholas Fish. It seems that on this second trial, Sampson, "at candle light, with sight so fatigued, and faculties so exhausted and in a state of health so ill suited to exertion," and pleading that "the very circumstance of his having undertaken to report the former arguments, with all the tiresome labour of transcribing, compiling, and correcting of the press, had effaced the livelier impressions of first conceptions, and must impart to what he should offer the vapid insipidity of a tale twice told," contented himself with reading "the authorities from the printed report," omitting "much the greater part from unwillingness to fatigue the attention of the jury already exhausted." Griffin on the next day came to the rescue of the common law by asking why "slaves cannot breath in England," and showing how the English, in contrast to the French, have always loved their laws. He did not however undertake to explain why the American colonists ran away from such beneficent institutions. Emmet closed the argument, giving his compatriots handsome compliments, but declining to argue the law to the jury, on the ground that they could not understand it! The mayor charged that the English conspiracy statutes were in force in this State; that the constitution of the society exposed a resort to compulsory and improper means to effect their end. There was nothing left for the jury to do but to bring a verdict of guilty, which they "shortly" did, and the court fined the prisoners one dollar each with costs!

Thus tamely ended the first trade conspiracy case in this country. It is amusing to note that by the constitution of the society the entrance fee was forty-three and a half cents, and the monthly dues were six and a quarter cents; that when the funds amounted to "fifty dollars"they were to be deposited in the United States Bank, "not to be drawn on except in case of a stand out." These money amounts recall to us the time of the prevalence of Mexican and Spanish silver currency, and when a dollar went a great way.

It is apparent from Sampson's own words on the re-argument that he had written out his speech for the press, and it is undoubtedly his version which is reported in the "Select Cases." Perhaps the reporter is not to be blamed for giving only summaries of the other arguments, but it seems a little cruel to say of Emmet's that "His address was such as the reporter would willingly lay before the public, did the limits prescribed to him admit of it; but the same reasons for which the speeches of the other counsel have been abridged must serve as his apology." He was peculiarly unfortunate with Colden's first argument, for the reporter destroyed Colden's notes, and Colden lost the reporter's version of it. So in the result, the canny and careful Sampson gets ninety pages in the report, while all his associates and antagonists together get only fifty-two! He did not choose to be judged by the adage, "*ex pede Herculem*" (or "*ex pede Sampson*"), nor like the modern Trilby, but put the whole body of his arguments in evidence. No one can com-

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plain of this, for while others may have equaled him in the other essentials of the great advocate, it is difficult to believe that any could have approached anywhere near to him in wit and sarcasm. It is somewhat surprising that Mr. Wallace, in his entertaining work, "The Reporters," should have made no allusion to this wonderfully brilliant argument, which constitutes a third of the little volume; but of this I do not complain, for if he had touched upon it at all, he would have left nothing for me to say.

A still rarer book is the third volume of Wheeler's "Criminal Cases," published in New York in 1823. Its excessive rarity is the fault of Mr. Sampson, whose argument in the celebrated case of Commissioners of the Almshouse *v.* Whistelo reported therein has been so much sought after, especially by the younger (and possibly the older) members of the Bar, in past times, that it has been seized upon and carried away by them with as small regard to the law of *meum et tuum* as if it had been an umbrella. The book was reprinted in 1860.

The case is too broad, as well as too long, for reporting in these chaste columns. To those who have not seen the report it will be sufficient to state that it was a bastardy proceeding in the General Sessions, presided over by Mayor Clinton, upon the complaint of Miss Lucy Williams against the defendant, "a black man," coachman for Dr. Hosack. Upon cross-examination, she confessed an intimacy with a white man at a time which might have rendered the paternity doubtful, but the child was unquestionably white. All the leading physicians of New York City, including Sir James Jay and Dr. Hosack, were examined as experts on the questions whether the child was white or black, and whether, if it was white, it could possibly have been the child of the defendant. They all swore favorably to the defendant, except the celebrated Dr. Mitchell,[1] who was strongly inclined to the opinion that despite its apparent color it might have been the defendant's offspring. In this case, Sampson, who appeared for the defendant, cross-examined Dr. Mitchell, and it was a brilliant encounter of wits and learning, with the advantage not always on the lawyer's side. It is safe to say that no other cross-examination of equal wit, humor and classic learning is to be found in the law reports. The learned Doctor, after the manner of medical men, delivered quite a lecture on the matter in issue, and unlike most medical men in such circumstances, he was not tedious. Sampson's summing-up covers some eighteen pages, and so much wit and graceful and sportive humor and wealth of classical allusion were surely never before compressed into such small space. There was no opportunity for display of legal research or forensic logic; it was a pure (or rather impure) question of fact to be determined by the aid of scientific opinion. In his exordium, Sampson said: "Before I lose myself in the labyrinth through which I am to tread, that I may not die in the learned counsel's debt, I shall first answer all his observations. If I should miss my way and never return to where I set out, my will is that all concerned shall mourn for me — the whites putting on black and the blacks white, in token of *affection. Item:* the manuscript I hold in my hand to be deposited in the city library. *Item:* the fee which I receive in this case to accrue to the benefit of the Almshouse."

[1] Dr. Samuel T. Mitchell was one of the most versatile, accomplished and distinguished Americans of his day. Although Franklin and Thompson flourished earlier, yet Dr. Francis, in his reminiscences of "Old New York," terms him "the Nestor of American Science." He was distinguished in politics as well as science, having been a senator of the United States. He was the first surgeon-general of New York. Frequent references are made to him by the poet Halleck in the "The Croakers," a series of local, humorous and satirical poems published in the first quarter of this century in the "Evening Post." One of the most amusing of these is addressed "to the Surgeon General," and is wholly given up to Mitchell. In this the poet styles him "mammoth of the State, steam frigate on the waves of physic." In another his "cookery books" are referred to, and in another he is celebrated as one "who sung the amours of the fishes."

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Oh, that the manuscript had been so filed! But instead of that, it was probably delivered to the printer for copy and stupidly destroyed. The case was so amusing, and Sampson's mirth was so infectious, that Mayor Clinton, in pronouncing judgment of acquittal, remarking upon the mother's confession of the dual masculine attentions which she had contemporaneously received, observed: "It cannot be expected that we should have recourse to the miraculous to bear out and support the testimony of the mother. The rule in dramatic poetry will apply to cases of this nature: —

> "Nec Deus intersit, nisi dignius vindice nodus
> Inciderit!"

In other volumes of Wheeler's Criminal Cases are reported some fervid arguments of Sampson, as counsel in the prosecution of Orangemen for riot, and assault and battery, but they call for little special remark. In one of these he undertook to read passages to the jury, in opening, from Plowden's History of Ireland, which being objected to, he said: "I have a right to read and print any speech too, and have I not a right to take part of it from Plowden's history, or any other history I think proper?" We are glad he acted on his right to print his speeches. In the same speech we glean one item of his biography. It was in 1824, and he said: "I have been here twenty years, and it is some proof that I shall not talk nonsense."

Sampson was of counsel for the artist Mezzara, who, having painted an unsatisfactory portrait of Mr. Palmer, a lawyer and master in chancery, which the sitter refused to accept, added a pair of asses' ears to it, and in that state it was seized on execution in favor of Palmer, and exposed for sale, Mezzara himself drawing attention to the picture by an advertisement in a newspaper. Mezzara was convicted of libel, and fined $100. The reporter (1 City Hall Recorder, 113) was somewhat learned and funny on his own account, but we devoutly wish that instead he had given us Sampson's speech, marked, as he says, by "much energy and humour."

It does one good to turn aside from the dusty and busy ways of modern jurisprudence to the old City Hall, and to those leisurely days when the New York General Sessions was a famous and an able and learned court, in which the most eminent lawyers of the city were wont to lock horns and quote the Latin classics.

There stands to Emmet a stately monument in the churchyard of old St. Paul's, in Broadway, New York, but the antiquary would probably seek in vain for any mortuary monument to Sampson. He has however left a more durable monument to himself in the marvelous speeches which I have reviewed.

Every thoughtful man must be puzzled in conjecturing what may be the occupations of the future state of being. There is so much time in eternity that earthly occupations will not go very far. But it seems to me that I could pass a good deal of time very pleasantly in sitting on the same cloud with William Sampson, Frederick Coudert and Oakey Hall, and listening to the discourse of those wits, scholars and charming companions. Miss Phelps thinks there will be pianos in heaven. But at all events, an air on Sampson's flute would prove a pleasing variation from the monotony of the conventional harping.

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A TRIBUNAL UNDER THE TERROR.

By George H. Westley.

AMONG the pictures exhibited in the Salon of 1881 was one by M. Georges Cain, the title of which I have borrowed for the heading of this article. Those who have seen this painting will remember that the scene is laid in a dismantled cathedral. Behind a stone sarcophagus, a most appropriate bench for their merciless methods, sit the three stern-faced judges. In front of the sarcophagus is seen the man of law, his desk, a beautiful and costly piece of furniture looted from some neighboring chateau. To the right stands the public accuser, pointing with outstretched arm at a fair girl who with pleading looks confronts the judges, and who is closely guarded by gendarmes with fixed bayonets. A howling, bloodthirsty mob in the background completes the picture of a tribunal under the Reign of Terror.

During this awful period in French history, such episodes as the one depicted by M. Cain were daily to be witnessed. The girl prisoner, we are told, was of noble family, and her only crime was that she was possessed of a wealth, position and culture above that of the rabble who clamored for her life. It is difficult for us in these calmer days to conceive of the state of affairs which existed in Paris at that time. The annals of the period show the most fearful travesties upon justice. Under the motto "liberty, fraternity and equality," perverted to mean that the person of more gentle birth, greater gifts, or larger fortune than the common citizen was a traitor to the republic, hundreds and thousands of innocent victims were dragged before the dread tribunal, and having run the gauntlet of suborned witnesses, were sentenced and executed within an hour. Woe betide the unfortunate who exhibited a trait which suggested the aristocrat; let but that hated name be applied to him and his neck would shortly have intimate acquaintance with the guillotine.

The infamous Robespierre had no more zealous follower than Fouquier Tinville, the bankrupt to whom he gave the position of public prosecutor. This man was an exaggerated Jeffreys, exaggerated not only in the cruelty of his prosecutions, but also in the strain of repulsive jocularity with which he sent his victims to the death. In so wholesale a manner did Fouquier commit his judicial murders, that some considered him to have been irresponsible as a human agent. One writer says: "The labors of this enthusiast in his vocation were incessant. His mind became disordered from overwork. To his haggard eyes the Seine presented the aspect of a river of blood mingled with the corpses of his victims. In the zeal of extermination he believed himself the arm of the people, the glaive of the revolution; a life spared, one accused acquitted, preyed upon his spirits." Another says: "He had no soul — not even that of a tiger, which at least pretends to be pleased with what it devours."

Having reached a condition of callous indifference to human suffering, Fouquier allowed himself scarce a moment's respite from the terrible duties of his office. After a day's session, during which he snatched his meals from the table on which he drew up the sentences of death, he spent his evening counting over the new list of the doomed received from the Committee of Public Safety. So long were these lists that to draw up individual accusations was impossible, even if he had deemed it necessary, which he did not, for, as he frequently observed, one victim was as good as another, and if by some error in the charge a prisoner should go free to-day, he should surely not escape to-morrow. Having finished his

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examination of the list, Fouquier threw himself on a mattress in the tribunal and passed the night there.

In "Mémoires de l'Exécuteur" by M. A. Grégoire, we have a very clear report of ten minutes spent in Fouquier's "hall of justice." Before the judges and the jury sit a crowd of innocent sufferers. The accusation is the usual vague one of conspiracy against the "unity and indivisibility of the Republic." A little distance from the prisoners are the accusers, perjurers, scum of the prisons, professional denouncers most of them, who find in this abominable work their means of livelihood. Advocates for the accused are not allowed.

The savage crowd of spectators being partially quieted by the gendarmes, the *greffier*, or registrar, reads over the list aloud, and the prisoners respond to their names. Fouquier on receiving the number — generally a hundred — rises and reads the common charge of conspiracy. This is very brief, consisting of only three lines. He then demands of the accused what they have to say in their defense. Thus far the proceedings have been formal enough, but now the brutal and arrogant Fouquier throws aside every semblance of judicial dignity. "Listen, you ancient on the perch!" he cries to an old man who happens to be seated on a bench higher than the rest of the prisoners; "You are charged to answer on behalf of your accomplices. What have you to urge in their justification and your own?" The old man in his terror stammers out: "That — that — that —," whereupon one of the judges remarks to Fouquier: "You cannot fail to perceive that this man is afflicted with paralysis of the tongue." "Let him hold his tongue then," said Fouquier, "his head is all I ask for. The next."

"Citizen Judges," exclaims a woman prisoner, "you are mistaken in my case. I have been arrested for another"; and she goes on to assure her prosecutors that the warrant under which she has been brought there was made out in the name of the *ci-devant* Duchesse de Maillé, whereas hers is Maillet and she is a tradeswoman of the Rue Honoré. Such an error is but a trifle to Fouquier. "Here the name makes no difference to the fact," he replies; "Maillet or Maillé, you are not the less an object of suspicion, and it is the same thing whether you come to this tribunal to-day or to-morrow." The unfortunate woman, who had probably hoped to escape on this plea, bursts into tears and tells him that she is a poor widow with children depending on her; but the merciless prosecutor cuts her short, exclaiming: "You have not the right of reply. The next."

A handsome, well dressed youth is the next speaker. "I admit the charge for which I was arrested," he says boldly. "A street sweeper splashed mud upon me, calling me a budding aristocrat, and I answered: 'I spurn your Republic!' but the law forbids you to put to death anyone under sixteen years of age, and I am only fifteen. Here is my certificate of baptism." Vain confidence. "The wolf-cubs are more dangerous than the full-grown wolves. Next!" replies Fouquier.

The Chevalier de Segrais pleads that he had been absent from Paris until the very hour of his arrest, and so could not be guilty of conspiring with his fellow prisoners, none of whom he had ever seen before. "Sufficient," cries the prosecutor. "The right of reply is taken away from you. To hear their accounts, all these messieurs are as pure as snow."

The lovely young wife of De Sartine defends herself with great coolness and wit, but is presently overcome by Fouquier's arrogant replies. Having silenced her, he cried: "You jade, if I could do without my dinner, I would come and see you guillotined."

A decrepit old woman whom her fellow prisoners have just been able to make understand that she is charged with conspiracy,

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exclaims: "What, I conspire? I am deaf and blind." "Then you must have conspired in the dark," replied the pitiless tormentor. "Next."

And so the farce went on, each of the prosecutor's grim pleasantries being applauded by the people, until at length Fouquier arose and announced that the hearing was over. There was a fencing master among the prisoners, whose anger got the better of his discretion. "We have not been heard, villain. Take your wages," he shouted, and seizing a leaden inkstand he hurled it at Fouquier's head. The aim was not good, but a good deal of the ink bespattered the prosecutor's face, whereat a voice cried: "Behold the fiend in his true colors, black as Satan." The fencing master was seized and bound. "Knave," cried Fouquier, "I have parried your thrust; you cannot parry mine."

There was no waste of words in the jury room. The foreman simply laid his hand edgewise across his throat, making a motion suggestive of decapitation, his colleagues nodded, and the verdict was found. On their return to the tribunal, they declared the culpability of the accused, one and all, and the president pronounced the sentence of death.

It is told that on more than one occasion the list of victims was added to by the distraction of the husbands, wives, sweethearts and friends of the condemned. Themselves free they had quietly witnessed the trial of those so dear to them, hoping against hope for their escape, but on hearing the fatal decree these distracted spectators sent up the defiant shout, "Vive le roi!" whereupon they were hustled before the prosecutor, immediately sentenced, and sent to the guillotine with those they loved.

The brutal apathy with which Fouquier regarded human life is shown in the following instance. A young merchant, whose companion had been executed, addressed to the prosecutor the following letter: "You have immolated my friend, the only possession I had left in this world. As I lack courage to take my own life, I send you my address; be good enough to deliver me from my misery." Across the bottom of this note Fouquier scrawled, "Let it be done as it is requested," and the young man was hunted up and executed without so much as the mockery of a trial.

On the principle of giving the devil his due, I relate the only instance recorded where Fouquier exhibited the human attribute of compassion. Legrand d'Alleray, at one time the employer of Fouquier, was charged with the offense of having sent money to his sons, who were fugitives. The prosecutor sent word to his old master that the proofs of his guilt had been destroyed, and that if he would deny the charge when interrogated, he would be set free. M. d'Alleray sent back the reply: "The little that is left me of life is not worth purchasing at the price of falsehood," and maintaining this attitude he went to his death, despite the prosecutor's efforts to save him.

Fouquier held the position of prosecutor for over a year, during which the victims of his bloodthirsty zeal were numbered by thousands. With the death of Robespierre, whom he also sent to execution, came a turning in the tide of events. But even while momentous questions were pending in the Assembly, and a more lenient order promised hourly to be issued, the sanguinary Fouquier could not be persuaded to stay his cruel hand. He had forty-two unfortunates hastily tried and sent to the scaffold, when, as he well knew, an hour's delay would have saved them from death. The order came, and the Reign of Terror was ended.

Under the new dispensation Fouquier and his accomplices were seized, and after a forty-one days' trial were condemned to the fate they had so often and with such reckless cruelty inflicted upon others. Their ride to the place of execution was followed

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by the fickle mob, who now clamored as loudly for Fouquier's blood as erstwhile they had clamored for the blood of the "aristocrats" upon whom they had encouraged him to wreak his vengeance. On the scaffold Fouquier exhibited great cowardice. The mob hurled their imprecations upon him. A band struck up an air of jubilation, and before it had ceased playing Fouquier had passed from the scene of his infamous villainies.

SPES.

By John Albert Macy.

WE shoot Hope's rocket in the air;
A fleeting moment's fitful glare
Lights up our world. The final spark
Dies out to leave us in the dark;
Then through the gloom so black and chill
The stick descends, and all is still.

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THE ENGLISH LAW COURTS.

VI.

THE ECCLESIASTICAL COURTS.

FROM the Queen's Bench Division, which formed the subject of our last paper, to the Probate, Divorce and Admiralty Division, might seem to be the natural transition. But for the sake of historical clearness it is desirable to treat of the Ecclesiastical courts before proceeding to discuss the tribunal to which many of their former functions have been transferred.

The English Ecclesiastical courts at one time exercised a very extended jurisdiction, comprising not only what we should ordinarily call ecclesiastical causes, but matrimonial suits and divorces *a mensa et thoro*, all testamentary causes and suits, suits for church rates, and suits for defamation. These different species of jurisdictions have, however, in comparatively recent years been stripped off. The jurisdiction of the Ecclesiastical courts over all matters and causes testamentary, including suits for legacies, was taken from them by the statute 20 and 21 Vict. c. 75, and conferred upon the Court of Probate, now the Probate Division. Their jurisdiction in matrimonial matters was transferred to the Divorce Court — now the Divorce Division — by 20 and 21 Vict. c. 85. Church rates were abolished in 1869, and the jurisdiction to entertain suits for defamation was done away with by the statute 18 and 19 Vict. c. 41.

The business of the Ecclesiastical courts is now practically confined to the trial of charges against clergymen — heresy, immorality, simony, and kindred matters. The principal courts of this description are the Consistory Court of the Bishop in each diocese, the Court of Arches, so called because its judge or dean, who is the Archbishop's deputy, originally held his court in the Church of St. Mary le Bow (*Sancta Maria de Arcubus*), and the Judicial Committee of the Privy Council, which is the final court of appeal.

It may be interesting, in dealing with the Ecclesiastical courts, to deviate from the lines, which we have hitherto followed in these sketches, of biographical notice, comment and criticism. The modern life of the ecclesiastical tribunals of England is summed up in the history of the Catholic revival and Ritualistic movement in the English Church, and an account of these will enable us to grasp its true character better than any other method of inquiry. Some time ago a distinguished member of the late Liberal government, Mr. George W. E. Russell, when presiding at a meeting in which the nonconformist element predominated, was challenged to say whether he was a Protestant or not. "I am a Protestant," he replied, "against the Pope; I am also a Protestant against your kind of Protestantism." Here we have in a nutshell the position of the historic Church of England. Long before the Reformation she protested against the Papal claims; she protests against these claims still; and adds to that an emphatic protest against the later Roman "developments" — Papal infallibility, the immaculate conception of the Blessed Virgin, and the rest. On the other hand, she claims herself to be an integral part of the one holy catholic and apostolic church of the Nicene Creed, and professes in her prayer-book the whole faith of that Church including the doctrines of apostolic succession, baptismal regeneration, confession — within limits as to frequency — priestly absolution, and possibly also the real presence of our Lord in the Eucharist. In the eighteenth and the early part of the

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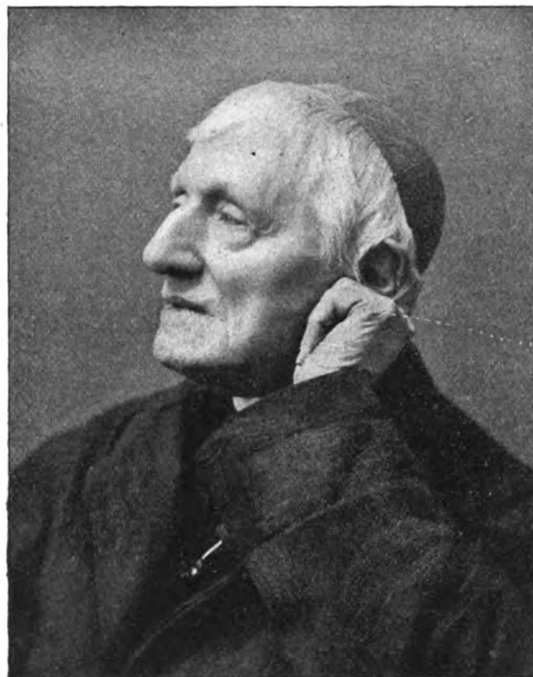
nineteenth centuries, however, the English Church, largely owing to mischievous Hanoverian and Whig influences, had not only drifted from, but lost sight of her moorings, and had sunk into a state of torpor which was scarcely distinguishable from spiritual death, and which was the *causa causans* for all practical purposes of English noncomformists. About — roughly speaking — the year 1830 a handful of young men at Oxford University set themselves to the Herculean task of arousing the Church to a true conception of her mission and spiritual powers. Foremost among them were Richard Hurrell Froude and John Henry Newman — afterwards the famous Cardinal-priest of Birmingham. The way had already been prepared by the hymns of the saintly Keble, in which the catholicity of the Church was insistently proclaimed. The Oxford reformers conveyed their views to the world in a series of short pamphlets entitled "Tracts for the Times." It need scarcely be observed that this reassertion of the position of the Church aroused the strong hostility of clergymen and laymen of "low" or "broad" church sympathies. The opposition reached a climax when Newman, in his memorable tract No. 60, analyzed the thirty-nine articles, and showed that they were elastic enough to embrace many doctrines hitherto supposed to be distinctively and exclusively Roman. That Newman was right in his contention is now conceded by all educated controversialists. The most superficial survey of the history of the Reformation demonstrates the fact that the articles were intended to be articles, not of compromise, but of comprehensiveness. But the atmosphere was far too highly charged with electricity for a cool consideration of facts like these at that time and the storm descended on the heads of the Oxford movement with a violence which drove the brightest intellect in England into the Church of Rome. The ludicrous project — in whose conception Baron Bunsen played an operative part — of a Protestant Bishop of Jerusalem (a project, by the way, which the present Archbishop of Dublin has recently made a foolish attempt to rival by his consecration of Señor Cabrera) did Newman's Anglicanism to death. The unsound and injurious decision of the Privy Council in the Gorham case produced the secession of Archdeacon, afterwards Cardinal, Manning. Other men went to Rome also, and its enemies thought that the Oxford counter-reformation was dead. In point of fact, it was signally and finally victorious. Pusey, the greatest statesman in the church, stood firm. Younger men grew up and gathered round him. The Catholic idea spread. In the brilliant language of Mr. Gladstone, the Church had "lit up like wildfire, the blazing title of catholicity on her brow"; and the dullest observer of English religious life could not fail to see



CARDINAL NEWMAN.

that the sign, strange and ominous as men deemed it then, had come to stay.

The Ritualistic movement followed hard on the Catholic revival. It was the logical and proper sequel to the prevalent Catholic teaching. If the English Church was the Catholic Church in England, on what possible ground of reason or common sense was she to be deprived of the use of the full Catholic ritual? Moreover, the Ritualistic propaganda was of immense value as claim of right. It offered a conclusive answer to the objection urged by Roman against Anglican theologians: "Your *soi-disant* catholicity is a mere plausible, literary, paper hypothesis; how can you for a moment place it side by side with the great working system of Rome?" Lastly, Ritualism had in it a strong æsthetic element. It was an endeavor after greater decency and reverence in public worship. The movement was gradual at first. The Holy Table, as it was called, was transferred from the nave to the chancel, and became an altar, crowned with flowers and surmounted with the sacred sign of the Christian faith. Other changes followed, and then the vigilance of ultra-Protestantism began to manifest itself actively. To begin with, weapons of criticism were alone employed. It was urged, honestly and strenuously, that the Ritualists, like the original Catholics, were Romanists in tendency, if not in intention. The charge was in either case absurd *a priori*, and has been falsified by the facts. It is of course obvious that to men of a certain intellectual temper the *via media* occupied by the Anglican and, for that matter, by the Greek, Church, cannot afford an ultimate resting place. But it is equally obvious that two movements which, the one in theory and the other in practice, insist upon the independent catholicity of the English Church, are far less likely to drive men from her bosom than the striking disparity which the "low" view of the Church produces between the formularies of the Prayer Book and the actual working beliefs of those who use it. Moreover, the Catholic revival and the Ritualistic movement have not, in fact, fed the ranks of the great Roman Church. These movements were, and are, as distinctly anti-Papal in character and in results as they were, and are, anti-Calvinistic. Argument soon gave way to prosecution, and it is at this point that the strictly legal interest of our subject commences.

THE BISHOP OF LINCOLN.

The Ritualistic movement was, as we have seen, the inevitable outcome of the revival of Catholic teaching in the Church of England; and it took its beginnings from the time when the opponents of Tractarianism objected to the few but able supporters of that cult whom the secession of Newman left firm and standing, that the alleged catholicity of the English Church was a mere paper hypothesis, which could not for

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a moment assert itself against the great working system of Rome.

The development of Ritualism was, however, the work of the first Ritualistic prosecution, the Knightsbridge case, Liddell *v.* Westerton (1857, Moore's Special Report). In that case the judges (Lords Cranworth and Wensleydale, Mr. Pemberton Leigh, afterwards Lord Kingsdown, Sir John Patteson and Sir W.H. Maule) laid down two important maxims of interpretation: (1) that whatever was lawful under the First Prayer Book of Edward VI remains so now, and (2) that the use of articles, reasonably subsidiary to the service, although not expressly mentioned in the rubric, is not necessarily to be forbidden. (It was under the protection of this latter canon that the credence table was declared legal.) On the strength of these two maxims the Catholic party set about the reconquest of the Catholic ritual for the Church of England with considerable vigor and enthusiasm. They were met by immediate opposition at the hands of the Evangelical party.

OLD ALTAR, ST. ALBANS, HOLBORN.

From the point of view of the latter body, the moment was peculiarly favorable for aggressive action. Their leader, Lord Shaftesbury, was a man whose name was deservedly a tower of strength to any cause that he espoused; and not only so, but as a near relation of the Prime Minister, Lord Palmerston, he had been able practically to regulate the constitution of the Episcopate, and had so regulated it as to give the Evangelicals a great, one might fairly say an undue, preponderance in its composition. The Church Association too had just been established (in 1865) as a counteractive to the English Church Union. We cannot here enter into the early non-litigious conflicts in which the rival parties engaged. (See on this subject A. H. Mackonochie's Life, by E. A. T., p. 140.) They came into actual collision first, after the formal outbreak of hostilities, in the case of Martin *v.* Mackonochie, which raged at intervals, and with such perplexing gyrations that it is difficult to tell at any moment what particular judgment was in force, from 1867 till 1883. A rapid survey of the course pursued by this remarkable suit may be of interest. It was instituted really by the Church Association, but nominally by a solicitor named Martin, who was technically qualified to prosecute in consequence of his name standing on the rate book of the district of St. Albans, and involved the legality of (1) the elevation of

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the cup and paten during the celebration of the holy communion in a greater degree than is necessary to comply with the rubric; (2) the use of incense for censing persons and things, or its introduction at the beginning of or during the celebration and its removal at the end; (3) the immixture of water with the wine during the celebration; (4) the act of kneeling during the prayer of consecration; and (5) the placing of two lights upon the holy altar during the celebration. Sir Robert Phillimore decided the first three of these points (on two of which Mr. Mackonochie had already given way) against Mr. Mackonochie; he held that the act of kneeling during the prayer of consecration was not unlawful, unless the bishop had forbidden it; he also held that the presence of two lights upon the holy altar was lawful; and gave the prosecutor no costs because of the divided honors of the suit, and his lack of any but a technical qualification as prosecutor. An appeal was taken to the Privy Council in regard to the permission of kneeling, the use of altar lights and the disallowance of costs, and on all three points the judicial committee reversed Sir Robert Phillimore's decision. (L. R. 2 A. and E. 116.) Here again however, as in the case of Liddell *v.* Westerton, the adverse judgment was robbed of its sting by two incidental passages in which in the court below Sir Robert Phillimore insisted on the historical and legal continuity of the pre-reformation and post-reformation church, and emphasized the distinction between ***non user*** and *the disuser* of lawful practices. These formidable weapons of offense and defense were not allowed to rust or to lie idle. But at this point the thread of the narrative must be broken for a moment to notice the case of Hebbert *v.* Purchas (1872 L. R. 2 P. C. 301), which had an important influence on the future stages of the Mackonochie suit. In that case the main point at issue, for our present purpose, was the vexed question whether the ornaments rubric in the Prayer Book, which is one item in the schedule to the Act of Uniformity, 1662, and which admittedly directs that the vestments used under the First Prayer Book of Edward VI "shall be retained and be in use" until further or other order, had been modified by Queen Elizabeth's advertisements in 1564–5, or, to put the matter in a different form, whether these advertisements came within the meaning of the words "other order" in the act of 1662. The judicial com-

CHANCEL, ST. ALBANS, HOLBORN, WITH OLD ALTAR.

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mittee of the Privy Council held — on very doubtful grounds, if we may respectfully say so — that they did. Mr. Mackonochie treated the decision of the Privy Council — which he regarded as a secular tribunal usurping spiritual functions — with scant respect, and a variety of subsequent proceedings — ending in his practical removal from the incumbency of St. Albans, Holborn, where he had labored with such fidelity and success — were taken against him.

The ways of the Church Association — which the late Bishop of Peterborough wittily described as the Church Prosecution Co. Limited, — did not, however, prosper. On the one hand the Ritualists, strong in the goodness of their cause, set the decisions of the Privy Council, in so far as these were adverse to them, at open defiance. On the other hand the Privy Council not only blessed where the Church Association desired that they should curse, but put incidentally very effective weapons in the Ritualists' hands. To several of these we have already alluded. The most important of them all was however, by a strange irony of fortune, supplied by Lord Cairns (who — an observation equally applicable to Lord Penzance — desired nothing more fervently than the extermination of Ritualism) in the case of Ridsdale *v.* Clifton (L. R. 2 P. D. 276). In that case it was argued that some of the points taken on behalf of the defendant had been concluded by the judgment of the Privy Council in Hebbert *v.* Purchas. Lord Cairns said: "Their lordships have had to consider in the first place how far, in such a case as the present, a previous decision of this tribunal between other parties, and an order of the sovereign in council founded thereon, should be held to be conclusive in all similar cases subsequently coming before them. . . . In the case of decisions of final courts of appeal on questions of law affecting civil rights, especially rights of property, there are strong reasons for holding the decisions as a general rule to be final as to third parties. . . . Even as to such decisions it would perhaps be difficult to say that they were as to third parties under all circumstances and in all courts absolutely final, but they certainly ought not to be reopened without the very greatest hesitation. Their lordships are fully sensible of the importance of establishing and maintaining, as far as possible, a clear and unvarying interpretation of rules the stringency and effect of which ought to be easily ascertained and understood by every clerk before his admission to holy orders. On the other hand, there are not, in cases of this description, any rights to the possession of property which can be supposed to have arisen by the course of previous decisions, and in proceedings which may come to assume a penal form, a tribunal even of last resort ought to be slow to exclude any fresh light which may be brought to bear upon the

SIR ROBERT PHILLIMORE.

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subject." If Lord Cairns had spoken without euphemism he would have said that questions as to the legality of ritual or doctrine, depending as they do largely upon historical research, are matters with which secular judges have neither the time nor the ability to deal, he would have been nearer the mark. We shall see the importance of his "fresh light" theory later on.

The next move in the anti-ritualistic game was the introduction by the then Archbishop of Canterbury — Dr. Tait — of the Public Worship Regulation Bill, providing for the appointment by the Archbishops of Canterbury and York of a secular judge in the Court of Arches, and enabling an archdeacon, a churchwarden, any three parishioners, or any three inhabitants — being males of full age — of a diocese, to bring before him, with the consent of the bishop, any unlawful additions to or variations of the authorized ritual of the Church, for adjudication. After some hesitation, and possibly not without an indication of royal sympathy with the measure, Mr. Disraeli treated it as a government bill. A very curious division of opinion on the subject, both in the Cabinet and in the Liberal opposition, was at once disclosed. The Marquis of Salisbury and Mr. Gladstone for once in their lives united to denounce it as an invasion of the spiritual privileges of the Church. Sir William Harcourt supported Mr. Disraeli in pressing it forward with the violence of language which was then his chief political characteristic, and with a wealth of ecclesiastical learning accumulated at a few days' notice. The honors of the controversy rested with Mr. Gladstone.

THE EARL OF SHAFTESBURY.

Although never a Ritualist, Mr. Gladstone has through his long life held with passionate and unswerving allegiance the High Church position, of which ritualism is one of the outward and visible signs. The apostolic succession, the necessity of episcopal ordination, baptismal regeneration, the real presence of our Lord in the Eucharist, the indissolubility of the marriage tie by any secular tribunal — these and all the other doctrines of the same kind, which are to dissenters a stumbling-block, and to easy going men of the world foolishness — are in Mr. Gladstone's opinion a catena of gifts and graces fraught with hope and blessing for mankind. He has criticised the Church of England with faithfulness and severity; he has dwelt on her faults more than some of her children consider to have been either just or generous. But no thought of leaving her communion has ever crossed his mental horizon. In one memorable passage in his "Gleanings from Past Years" he points out that while those who believe that a church is merely a voluntary association of Christians may pass from communion to communion lightheartedly, no such course is open to those who hold the Church of England to be the appointed channel in

which it is the Divine will that they should stand to receive from the Author of Christianity "the gifts which He purchased with His tears and His blood." "From none other," he adds, "can we presume to look for spiritual sustenance." This exalted conception of the position of the Church, as it was subsequently the cause of Mr. Gladstone's adoption of the disestablishment cult, so now was the motive-power of his resistance to the Public Worship Regulation Bill. He was unsuccessful. The bill passed into law. But his opposition to it leavened public opinion and prepared the way for the age of mutual tolerance in the Church which is now setting in. Lord Penzance was appointed judge under the new act. His ecclesiastical sympathies were as "low" as its most ardent promoter could desire; but his services have happily not been called into frequent requisition. "Nine cases," says Sir Walter Phillimore (Eccles. Law, p. 1036), "including double proceedings against the late Mr. Dale and the Dean and Chapter of St. Paul's, have been brought under this act. Of these, three did not come to a hearing. It is believed that a few more than these nine so mentioned reached the stage of a representation, but were then stopped by the bishop. This is, as far as known, the sum total of the use, in twenty years, to which the act has been put."

REV. ALEX. H. MACKONOCHIE.

The latest anti-ritualistic prosecution was the case of Read *v.* the Bishop of Lincoln. It was conducted from beginning to end in the most imprudent manner from the anti-ritualistic point of view. There was, of course, a great attraction to that party in the idea of landing in their net — if the Petrine character of the metaphor may be forgiven — a real live bishop. But the Bishop of Lincoln was the last person against whom the operation ought to have been directed. In the first place he was only a moderate Ritualist. In the second place, while not possessing either the statesmanlike or the supreme intellectual gifts of the great and wise ruler of the vast diocese of London — Dr. Temple — he was and is the most lofty spiritual figure in the Church. To many men — some of whom are known to the present writer — the name of Edward King, Bishop of Lincoln, has been a lodestar from agnosticism to faith and hope. However, the *fiat* went forth, and Dr. King was prosecuted. The charges against the reverend prelate were these: that he permitted lighted candles to be used on the altar during the celebration of the Eucharist, although they were not required for the purpose of giving light; that he allowed water to be mixed with the sacramental wine in and as part of the service, and administered the wine and water so mixed to the communicants; that he stood during the communion service, down to the ordering of the bread and wine, on the west and not on the

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north side of the altar; that he performed the manual acts whilst standing in such a position that he could not be seen by the communicants; that he permitted the hymn "Agnus Dei" to be sung immediately after the prayer of consecration; that he made the sign of the cross during the absolution and the benediction. The case came before the court of the Archbishop of Canterbury. It is understood that the Ritualistic party would have agreed to be bound by the decision of this tribunal, which was practically revived for the purpose of trying the case, but that the prosecutors declined to assent to this proposition. If they had done so, they would have put the Ritualists in a cleft stick. Either they must accept the Archbishop's decision or they must incur the odium of appealing to a secular tribunal. As it was, they were enabled to say that the Archbishop's court was under the circumstances a mere secular court of first instance, of no higher authority than the Privy Council, before which the Bishop of Lincoln, as a good High Churchman, did not put in an appearance. The Archbishop decided in Dr. King's favor as regards the lighted candles, the westward position, and the "Angus Dei," and against him in regard to the mixing of water and wine in and as part of the service, the performance of the manual acts so as not to be seen by the communicants, and the sign of the cross in the absolution and the benediction, and the Privy Council substantially affirmed this judgment on appeal. It is interesting to observe that the singing of the "Agnus Dei" had been admitted to be unlawful in Ridsdale *v.* Clifton, but that, following Lord Cairns' "fresh light" theory, the Privy Council declared it legal in the Lincoln case.

The Anti-Ritualists have rather shunned legal proceedings since their attack on the Bishop of Lincoln. One hears from time to time rumors of a crusade against the ecclesiastical vestments which are now in regular use in the Church. But probably the "fresh light" theory will be sufficient to keep the crusaders at bay. Moreover, the modern High Church school, under the able guidance of men like Canon Gore and Canon Scott Holland, is so conciliatory and magnanimous in spirit, that the possibility of attacking it with success is becoming every day more remote, and the very desire to make such an attack is disappearing from our midst.

There has recently been an interesting controversy, however, as to whether the bishops are bound to issue licenses for the remarriage of divorceés. Dr. Tristram, the Chancellor of the diocese of London, made an interlocutory statement on the subject last May, maintaining the affirmative of this proposition. But an opinion by Sir Richard Webster and Mr. Digby Thurnam was published immediately after, denying the accuracy of Dr. Tristram's law; and the taste and the propriety of the Chancellor's "judgment at large," as it was cleverly styled by the "Times," have been sharply criticised in legal circles. The matter will doubtless be settled by legislation.

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AN ASTRAL PARTNER.

By Hon. Albion W. Tourgée.

(Concluded.)

WE found young Morris dozing on the bed. His father told me that the "seances," as they are termed, were very exhausting, and he denied himself the pleasure of hearing from the other members of his family as frequently as he should wish, to avoid over-tasking his son, especially now that he was in college, where his studies seemed to be as much as should be required of him. There were times, he said, when it was impossible for the young man to rest unless he had communion with the unseen. In such cases, he took the train to the city, went at once to his father's office, and returned the same day.

Rousing the young fellow, Mr. Morris informed him that I had consented to come and "see if Esther would communicate" with me.

"Oh, she will talk with him fast enough," answered the son. "She has been anxious to meet him for a long time."

It seemed to be very singular that both father and son spoke of the sister and mother, not as dead or separated from them, but as if present, though invisible. We sat down at a plain wooden table which was in the center of the room. The cloth had been removed, and on the table was an ordinary hinged slate.

"I bought this on my way back from your office to-day," said my client, showing me the brand of a well-known city firm burnt into the frame. "My trunk has not yet arrived, and the one we generally use is in that. You see there is no writing on it," he continued, handing it to me.

I nodded in reply.

"I wish you would examine it, and if you desire, you can rub it with a moist cloth to make sure."

"Oh fudge!" I replied. "I have not come here to make spiritualistic tests. I know nothing about such things, and might very easily be deceived. At least, I am in no mood for the experiment. I came at your request to receive a communication from your daughter in regard to our case. If she has anything to say I am here to hear it."

I do not doubt I spoke in an incredulous tone. I felt that I was being made an actor in a farce which was neither humorous nor creditable, and sincerely wished myself out of it. I own I was startled, however, when as I finished there came three sharp raps under the table just where my elbow rested on it.

"Yes, yes, my dear, in a minute," said Mr. Morris, as if speaking to an impatient child. He took up a slate-pencil lying on the table as he spoke, bit off a small piece two or three times the size of a pin's head, dropped it between the slates and asked me if I would like to tie them together.

"Why should I? You forget that all this is nonsense to me. Go on in your own way and let me see the result. I am here merely as your counsel, not as one anxious to investigate specific phenomena."

He shut the slate; they each put a hand on it and asked me to do the same. Almost the instant that I had done so, there came an indistinct scratching, as of some one writing inside the slate — at least there is where the sound seemed to come from. This continued for several minutes — I should say ten or fifteen — sometimes stopping and then beginning again, for all the world as one does who stops to think in writing a letter. At last it ceased, and there came three raps under the slate. We took

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our hands off, and my client pushed the slate towards me. I opened it, and there, sure enough, was a letter addressed to me, written in the fine-pointed style then commonly used by women of good education. I afterwards saw many letters written by Esther Morris during her lifetime, and must admit the striking resemblance between the handwriting of them and of the letter I saw on the slate.

There was nothing remarkable about this letter except its evident femininity, and the fact that the mind which conceived it was familiar with our case. I must confess that in spite of my incredulity there was something eerie in the idea of a letter written by one in the spirit world, in such a manner, under my very eyes in broad open day. But I had long before decided not to waste any of my allotted span in speculating on actual or apparent mysteries of this sort.

The writer stated that she had been a long time endeavoring to find Williams and get him to give her information in regard to his transaction with Cooper, so that I might have the advantage of knowing exactly what had occurred between them. This, she said, was a difficult matter, as the "disembodied" — such was the term she used — were very loath to revert to events happening in the earthly life unless some strong passion or close attachment still bound them to it. The matter of the Cooper Hill Mining Company not greatly impressing the spirit-nature of Mr. Williams, being merely an incident of his mortal existence, it was difficult to get him to recur to it. Indeed, she said, he seemed to have lost all interest in earthly affairs except as they might affect his son, now a young man of about twenty years of age. Her reason for advising the continuance was only that she might yet learn something to our advantage from Williams. I was struck with the fact that she did not profess to know everything, nor to predict the future, the ability to do which we are, I think, unreasonably inclined to attribute to departed spirits.

So our case was continued at this term, and also at the next; the last time at our cost, the judge making that a condition. The same ghostly mummery was again gone over, with about the same result, except that my disembodied partner seemed not a little annoyed at her continued inability to accomplish more definite ends. At the next fall term, a year after the first consultation, came a startling change of programme. The defendants had made it up with Garner, who was again his old place as bookkeeper at the mine. Our own best witness had left the state on a journey to the West, and would not return until after the term. This journey had been undertaken without our knowledge or consent, and, as his evidence was material, we were not only in no condition to try, but had good cause for further continuance, which I urged as the only proper course to pursue. But the messages from the spirit-world were very positive the other way. No sort of persuasion could induce my astral associate to accede to my opinions, and my client took her advice, not mine. So we notified our opponents that we would try at that term.

It may be imagined that I was in no amiable mood on the morning when our case was reached, and the clerk called, as the next in order on his trial-docket, Morris *v.* The Cooper Hill Mining Company, Mr. —— —— for plaintiff.

"Are you ready?" asked the judge.

"I will call our witnesses and ascertain, your Honor," was my reply.

I went to the clerk's desk with leaden feet, half-inclined to throw up my brief and quit the case, even then. The clerk handed me the package of papers; I sorted out the subpoenas for our witnesses; called their names; asked to be allowed a moment to confer with my client; stepped across the bar, and made one more appeal to his common sense as against his superstition.

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I might as well have argued with the winds.

While we talked my grasp on the big bundle of papers loosened and some of them fell to the floor. Gathering them up, one, a small slip yellow with age, attracted my attention. Somehow I seemed never to have seen it before. A glance, half-unconscious, showed me that it was the execution against the property in question, which had been issued seventeen years before. Still continuing my conversation with my client, I opened it, mechanically glancing over it for the endorsement of the order to levy on the land, which the law made necessary to the validity of such a document. There was the return of "no personal property to be found"; the record of levy on the land, and the return of sale to Azariah Cooper, the highest bidder; but no *order* for levy to be made. Without that order entered on the execution itself, the levy was void, and our title good.

I felt as if a load had been lifted off my shoulders. I had to wait a moment to collect myself and calm my countenance so that it might not express exultation, for a lawyer never knows what mine his enemy may have ready to explode beneath his feet. I turned, and said in as careless a tone as I could command: —

"The plaintiff will try, your Honor."

My opponents were sitting about a table, looking as unconscious as if they had no interest in the case whatever; but their client, who sat near, was unable to repress his anxiety: he was unquestionably worried.

"Is the defendant ready?" asked the judge.

Mr. Waring, the leading counsel for the defence, replied: —

"We will call our witnesses and ascertain, your Honor."

He rose as he spoke and extended his hand for the papers, which I gave, reserving our subpoenas and the execution. He called his witnesses, and spoke in a low tone to his associates. Then he turned to me and said: —

"I suppose you noticed that your witness, Masten, did not answer?"

"We shall have to get along without him," I replied composedly.

Mr. Waring bent over the table, and the three lawyers literally put their heads together. After a moment, Cooper was called on to add his carroty poll and troubled red face to the conclave. When the heads separated, Waring said: —

"Will your Honor allow me to confer a moment with my brother, Hardynge?"

The Court nodded; and beckoning to me to follow, Waring led the way out of the bar, through the crowd, to one of the jury rooms.

As we passed out, a young man splashed with mud approached me and asked for a moment's conversation. Stepping inside with him, he said: —

"Pardon me; my name is Archibald Williams. I am the son of the man who was the agent of Hook & Company at the Hill Mine, as it used to be called; now the Cooper Hill Mine. I have been looking over father's papers for a week to see if I could find anything in reference to the matter. It has been on my mind for months, and I have hardly been able to sleep because of it. You see, it reflects upon father's honor that he should have permitted the property to be sold when he had plenty of his principals' money in his hand to pay the debt. Last night I happened to think of looking through a big pocket-book, a sort of wallet he used to carry. Here it is," he continued. "I noticed a side of one of the compartments seemed stiffer than the other, and saw that a piece of thin cloth different from the rest of the linings had been pasted over it. Ripping this off, I found under it this paper, directed to Hook & Co., Philadelphia. It is unquestionably in my father's handwriting. I have ridden twenty miles this morning to give it to you, and hope I am not too late."

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I hastily ran over the paper and saw that it was a statement of the agent, fully sustaining our hypothesis of the case as to Williams' collusion with Azariah Cooper to prevent confiscation of the property. Thanking the young man, I asked him to remain within call, and entered the jury room where Waring was waiting for me.

"Well," he said, as he closed the door, "I see you know it's all up with our case. Jackson thought we had better go on with the trial and see if you wouldn't miss the point; but I saw when you kept back the execution, that you were not to be caught napping. I myself never knew the defect in title until a few days ago. I had the old County Court papers hunted up, knowing it would not do to stand upon the docket-order and the sheriff's deed, and was surprised to find the order for levy had not been endorsed on the execution. It was a very careless thing on the part of Woodson, who was Cooper's counsel then. It is pretty hard on Cooper, though, to lose such a property which he has so long thought his own."

"Think so?" I asked. "Did you know Williams', the agent's, handwriting?"

"Perfectly."

"Is that it?" showing him the letter.

"Yes, there is no doubt about that," examining it closely.

"Will you please read it?"

Waring perused the letter carefully, turned it over and asked where it came from. I told him how it had come to my hand.

"Well," he said, with a look of disappointment. "I would not have expected it of Azariah Cooper. That accounts for his anxiety to compromise the case against our advice. If he had gone on the stand, you'd have surely bowled him over on cross-examination. He hasn't the nerve to stand up to a lie. Well, it cannot be denied that he has greatly improved the property."

"And received much profit from it," I replied.

"Perhaps; but a suit for mesne profits would break him all up. He has a very interesting family. I think an exposure would almost kill his wife and daughters."

"I'll see what my client says," I answered. "I suppose we are to have a verdict?"

"Certainly."

"After that then, we will confer as to the terms to be allowed Cooper. Can you come to my room to-night? We can probably save his good name, at least. But I must consult my client and — and — my associate." A queer look came over Waring's face, but I did not stop to explain.

We returned into court, when Waring, after a word with his associates, said:—

"It is agreed, if the Court please, that the jury shall return a verdict for the plaintiff, and that he have judgment according to the prayer of his complaint. A decree will be agreed on and submitted."

The clerk called the roll of jurors, empaneled them in the case, and said: —

"Stephen Watkins, foreman, you say you find all the issues in favor of the plaintiff, under the charge of the court? So say you all?"

The jurors bowed assent, and the famous case of Morris *v.* the Cooper Hill Mining Company was at an end.

The crowd which had assembled in anticipation of hearing an interesting trial, dispersed wondering what it all meant.

On the way to our hotel, I introduced young Mr. Williams, a fine manly fellow, to my client and his son, and was glad to see that both seemed much pleased with him. Mr. Morris went with me to my room, where I informed him of all that had occurred, which up to that moment had been as much of a mystery to him as to the crowd.

"I knew Esther must be right," was his placid comment.

"But the defect in the title would certainly have been discovered if we had tried a year ago," I answered, piqued at what

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seemed a reflection on my professional acumen.

"Very probably," he replied; "but Mr. Cooper's reputation might also have been ruined, and his family disgraced."

"You know them?"

"I dined there once when I first came to look the matter up. Esther was with me at the time, and was greatly attracted by his young daughter. Her name is Estella, and similarity of names and tastes made them fast friends. We regretted the suit, which of course broke this friendship off."

"Well, it is for you to say what terms you will make with Cooper. He isn't entitled to any consideration, but—"

"He has been weak; I don't think he is bad. But I must consult Esther before I decide on anything."

Two hours later he entered my room with a memorandum in his hand.

"This is what Esther says," was his comment, "and I suppose it will have to be so."

It was the first time I had heard him express the least hesitancy about submitting to his daughter's direction. In response to my look of inquiry, he said:—

"I don't see how I am to stand the separation from Willie."

The following were the terms imposed by the invisible counselor:—

"Mr. Cooper to be allowed to retain all that he has made by the operation of the mine, in consideration of having saved it from confiscation and greatly improved its value.

"William Morris, who has just graduated, and has a fancy for mining engineering, to be given two-thirds of the property on condition that he personally superintend its workings for three years.

"Young Archibald Williams to be given one-third interest in it, on account of his father's faithfulness and his own honesty."

"Well, I declare," I said after reading the terms, "she is rather liberal with your property."

"Oh, I don't mind that," was the answer; "it is just so much found in the dishwater, you know. Besides, all I have is Willie's—now she is no longer here—but without him,—how shall I be able to speak with her?"

I did not say it, but when I thought of the young young man's nervous condition—he really looked haunted—I could not but admit the wisdom of the conditions imposed, whether they came from another world or not. Two years afterwards, when he married Estella Cooper, and brought to the hungering father one who in part took the place of the lost daughter, I was inclined to accept the decision as worthy of the source claimed for it—especially as I learned that with more robust health the young man had ceased to be a medium. Deprived of what had come to be a weakening influence, this communion, or what he believed to be communion, with the departed, my client took greater interest in promoting the happiness of others, and from that time until his recent death, his life was one of the sweetest and noblest I have ever known.

What is my opinion of the "manifestations" which I saw? Exactly what it was when they began,—that I have no key to the solution of the mystery nor any time to hunt for one. In short, I do not care a fig whether they were suggestions of the strong man's own brain and heart, or of the dead daughter's love, to which they were attributed.

That he was sincere in his belief I do not doubt, but I think in his later days he began to question whether the messages were not unconscious reflections of his own thought, impressed on the susceptible mind of his son.

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THE ORDEAL OF BATTLE.

MANY a suit and many a crime were tried by the ordeal of battle, under the ancient judicial system, and until a comparatively recent date, the law books contained decisions of points arising on these contests. A report is given by Dyer[1] of the manner of a preparation for one of these combats, in the time of Queen Elizabeth, and we are sure our readers will be interested in its reproduction here:—

"Paramour chose the trial by battle and his champion was one George Thorne ; and the demandants' champion was one Henry Nailer, a master of defence. And the Court awarded the battle, and the champions were by mainprise and sworn to perform the battle at Tothill in Westminster, on the Monday next after the Utas of the term, and the same day given to the parties, at which day and place a list was made in an even and level piece of ground, set out Square sixty feet on each Side due East, west, north, and south, and a place or seat for the Judges of the Bench without and above the lists, and covered with the furniture of the same Bench in Westminster Hall, and a bar made there for the Serjeants-at-law. And about the tenth hour of the same day three Justices of the Bench, Dyer, Weston, and Harper, Welshe being absent on account of sickness, repaired to the place in their robes of Scarlet, with the appurtenances and coifs also. And there, public proclamation being three times made with an Oyes, the demandants first were solemnly called, and did not come. After which the mainpernors of the champion were called to produce the champion of the demandants first, who came into the place apparelled in red sandals, over-armour of leather, bare-legged from the knee downward, and bare-headed and bare arms to the elbow, being brought in by the hand of a Knight, namely Sir Jerome Bowes, who carried a red baston of an ell long tipped with horn, and a yeoman carrying a target made of double leather ; and they brought in at the North side of the lists, and went about the side of the lists until the middest of the lists, and then came before the Justices with three solemn congies, and there was he made to stand on the South side of the place, being the right side of the Court ; and after that the other champion was brought in like manner at the south side of the lists, with like congies, etc., by the hand of Sir Henry Cheney, Knight, etc., and was set at the north side of the bar ; and two Serjeants being of counsel of each party in the midst between them. This done the defendant was solemnly called again, and appeared not, but made default, upon which default Barham, Serjeant for the tenant, prayed the Court to record the nonsuit, which was done. And then Dyer, Chief Justice, reciting the writ, count and issue, joined upon battle and the oath of the champion to perform it, and the fixing of the day and place, gave final judgment against the demandants, and that the tenant should hold the land to him and his heirs forever, quit of the said demandants and their heirs forever ; and the demandants and their pledges, to prosecute in the Queen's mercy, etc. And then solemn proclamation was made that the champions and all others there present (who were by estimation about four thousand persons) should depart, every man in the peace of God and the Queen. And they did so *cum magno clamore Vivat Regina.*"

It is stated that the Queen ordered that this wager of battle should not take place, and compelled the parties to come to terms by which Paramour retained his land and Lowe received a sum of money But in order that Paramour's title should be made secure, it was arranged that the performance of a battle should be prepared and that default should be duly made. After which Nailer offered to the Chief Justice to play Thorne half a dozen rounds for the diversion of the Judge and the spectators. Thorne, however, who had much power but little skill, declined, saying he came to fight and not to play.

The Chief Justice then commended Nailer for his courage and broke up the Court.

[1] Lowe and Another *v.* Paramour, Dyer, vol. III, fol. 301, 13 Eliz. (A. D. 1570).

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CURRENT TOPICS.

THE REVISED REPORTS. — The most readable part of Sir Frederick Pollock's "Revised Reports" is the prefaces, in which one always finds something striking, frequently brilliant. In remarking on Lord Byron *v.* Johnston, vol. 16, p. 135, he says: "Lord Eldon has often been called hard names (unduly, as most lawyers think) for depriving Shelley of the custody of his truly begotten children; I am not aware that the world of letters has ever given him due credit for helping Byron to repudiate the spurious offspring which some private bookseller sought to father on him." Of Douglas *v.* Scougall, vol. 16, p. 72, he says: "That was a merry and provident master of the good ship 'North Star' of Leith, who used up a great part of his log-book for making cartridges." Again: "The long war-time is over, but we still hear echoes of it in the courts." From Taylor *v.* Curtis, p. 686, we learn how the British vessel "Hibernia" repulsed, with only twenty-two men and six guns, our American privateer, carrying twenty-two guns and a hundred and twenty-five men,— more than five to one in men and a gun for every man of the "Hibernia's" crew. "This must have been a brilliant affair. Our people did not commonly find the Americans too easy to deal with, even on equal terms. We have now taken the better way of feasting instead of fighting together, and this year the visit of the 'Chicago' to our waters has enabled us to recognize Captain Mahan's position as an authority on naval strategy by the eminently British methods of giving him and his fellow officers a solemn dinner, and sending him home a Doctor of Civil Law, though certainly not a sea lawyer." This is what one always gets for patting John Bull on the back. So Mr. Bayard's declaration that this country is the best customer of Birmingham was received with cheers that almost rent the little island. We guess that the privateer must have been carrying those twenty guns as ballast or freight.

In the preface to vol. 23, the learned editor points out that Lord Eldon's judgment in the famous case of Shelley *v.* Westbrook, which deprived the infidel poet of the custody of his infant children, proceeded more upon the poet's practical than upon his theoretical infidelity, as he had deserted his wife, was cohabiting with another woman, and wished to gain his offspring in order to educate them in his own unbelief. Of this the light horseman of the "London Law Journal" says: —

"How many persons of that strange drama live again! Old Westbrook, the Mount Street eating-house keeper, the pretty Harriet, the clever Mary Godwin, and last, not least, the extraordinary being, 'Bysshe.' 'Beautiful, ineffectual angel' Matthew Arnold calls him. To Lord Eldon the poet appeared in much darker colours. Lord Eldon had some old-fashioned prejudices, but he was far from intolerant. He could allow that an Unitarian did not necessarily make a bad citizen, and, if Shelley would have kept the sentiments of Queen Mab locked in his own breast, perhaps he might have let him have his children; but Shelley was one who would spread his light — lurid light too often — in season and out of season with a passionate insistence, and acted out his principles with an amazing amount of consistency and inconsistency. The climax was reached when he invited Harriet — the derelict — to join him and Mary on a tour in Switzerland. All Professor Dowden, who knows most about it, can find to say for this saviour of society is that he was always in morals a child. It is quite certain that there was never any one worse fitted for parental responsibilities than this intellectual but 'ineffectual angel.'"

In the same preface Sir Frederick refers to "Laurence *v.* Smith, p. 123, in which Eldon laid it down "that the immortality of the soul is one of the doctrines of the Scriptures" — which Sir Frederick says "seems, in that unqualified and universal force, a disputable piece of theology;" and "that the law does not give protection to those who contradict the Scriptures," and refused to restrain the pirating of a book alleged to be unorthodox, until that question had been settled at law. "This case never has been disapproved," says the editor in a note to it, "but the doubt whether there can be copyright in a book impugning scriptural doctrines in decent and modest language would now hardly be felt by any court of justice in any English-speaking country." In another note he points out that Eldon refused to restrain the pirating of Byron's "Cain" on the same ground. In this volume is the case of The King *v.* Davison, holding that a judge at *nisi prius* may fine a defendant for contempt in his address to the jury. The judge in question was Best, and the defendant

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was on trial for blasphemy. Best warned him not to revile the Christian religion or attack persons not before the court. Davison started off by saying that no barrister would undertake to defend an honest cause like his. Best again warned. Davison replied, "My lord, if you have your dungeon ready, I will give you the key." Best fined him £20 for that. Davison then asserted that deists regarded the Scriptures as derogatory to the honor of God, destructive of morality, and opposed to the best interests of society. Fine of £40 for that. Then Davison said: "The Bishops" — we don't believe he said it with a capital B — "are generally skeptics." Fine of £40 for that. All the judges, including Best himself, gave opinions. Best said he had taken the fines off, upon the defendant's submission, and that seems to be the only sensible thing he did. This report is curious reading three-quarters of a century after the event.

Of Brittain *v.* Kinnaird, vol. 21, p. 680, the editor says it "reminds one irresistibly of a couplet in Leycester Adolphus's eclogue 'The Circuiteers' (see L. Q. R., 1, 233):—

> "'Let this within thy pigeon-holes be packed,
> A choice conviction on the bum-boat act.'

"But as this case was twenty years earlier than the poem (or at any rate its production at the Grand Court of the Northern Circuit), we can hardly suppose that it was present to the learned and ingenious writer's mind." Of Gladding *v.* Yapp, vol. 21, p. 278, he remarks: "The ungallant testator who said of his sister that she was 'no scholar and only a woman,' did not show any superior capacity in making his own intentions clear."

We sympathize with Sir Frederick's prejudice against commas, as indicated in his preface to vol. 22, although it must be confessed that he is extremely ascetic in his use of them; and we agree with him that "such" as a demonstrative is an "ill word."

In that preface he observes: "Among the more innocent vanities of the time we meet with a 'carriage called a Dennett (see at p. 507), which appears from the Oxford English Dictionary, 8 v., to have been some slight variation of a gig." This word is given in the Century Dictionary, and defined in the same way, by reference to a passage from Theodore Hook.

In the preface of vol. 14, speaking of Dempster *v.* Cleghorn, p. 102, involving a servitude of playing golf, he quotes from Lord Eldon's opinion, that "this game of golf was a useful exercise, and appeared to be a very favourite pastime in North Britain," and adds: "South Britain has now been led captive in the matter of golf; even among the learned professions one may hear talk of niblicks and mashies, and those rugged names to our like mouths grow sleek!"

In the preface to vol. 13 he very irreverently speaks of Lord Eldon's "declining into his senile manner of interminable doubt." One would suppose that at whist his lordship would have taken every trick.

In the preface to vol. 11, he quotes from Best's arguments in the O. P. riot case, Clifford *v.* Brandon, p. 731: "Bells and rattles may be new to the pit, but cat-calls, which are equally stunning, are as old as the English drama."

Of Blewitt *v.* Marsden, vol. 10, p. 284, a case of a sham plea of a judgment pretendedly recovered in the Court of Piepoudre in Bartholomew Fair, he observes that "there is a kind of grotesque heroism in the junior bar amusing itself with putting sham pleas on the files of the court while England was standing almost alone against the victor of Austerlitz."

In the preface to vol. 7 we are enlightened by the information that the phrase "make a decision" is "out of use with us," but "readers who may think it an Americanism" are referred to two instances of its use by Lord Eldon. That certainly is not in its favor.

In the preface to vol. 6 he says: "*Ex-parte Softly* (p. 329) will be more likely to remind the student of 'Peter Simple' than of anything he has seen in recent law books. But the common law power of impressing men for the navy, though dormant, has never been abrogated." Some things die in England without proclamation.

In the preface to vol. 4 he tells of an editor of a Biblical dictionary who, under the title of "Deluge," simply said, "See Flood," and when he came to "Flood," simply said, "See Deluge." This practice is not without following in the present day among legal digesters.

Thus we have backed through Sir Frederick's prefaces. It only remains to add that he is continually finding necessity for explaining to some fault-finder why he has left out this, that or the other decision. If Sir Frederick will consent to receive a suggestion from a somewhat mature American editor, he will find it the easiest and the safest course, in the long run, never to explain and never to apologize, for the former does not elucidate and the latter does not satisfy.

"Leading in Law and Curious in Court." — Such is the curious title of a very curious law-book, of some fifteen hundred pages, compiled by Benjamin F. Burnham, and published by Banks & Brothers, of Albany, N. Y. It is evidently the result of a vast amount of reading and of systematic commonplacing for many years. Hardly anything striking, novel,

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curious or humorous in the domain of the law seems to have escaped the keen observation of the author, and the two principal sources of information of this kind in this country — the "Albany Law Journal," and the GREEN BAG — have been largely drawn upon. There are one hundred and seventy-five pages of biography and anecdote of leading lawyers, arranged alphabetically, mostly very well conceived, although several of the sketches are somewhat inadequate, as for example, those of David Dudley Field, Alexander Hamilton and Nicholas Hill. In this department there is a very considerable amount of unfamiliar and interesting information. Forty pages are devoted to "Lingo," including definitions; and this is a very agreeable chapter. A chapter of fifty pages, entitled "Episodes," is the weakest part of the book, and might have been omitted, as smacking too much of the newspaper, and as rather below the dignity of the remainder. There are other chapters on Judges, Jurors, Criers and Constables, Witnesses and Evidence, Litigants, Reporters and Curious Laws. This forms the first part. The second part, entitled "Curious Cases," is a rich mine of strange suits, concerning various subjects, from animals to Witchcraft, including the fruitful heads of Negligence and Torts, and the very amusing topic of Sunday (which is comparatively slightly treated in fourteen pages). This portion of the work will prove of solid use. The cases therein chronicled form a table covering thirty-two pages in double columns in fine type, and are stated in a remarkably clear, concise and accurate, and at the same time readable manner. Indeed, Mr. Burnham (who has done much reporting) herein evinces a talent that is exceptional and admirable. Probably no serious law-book ever before stated so much law and stated it so well in the same space, and this part of the book alone should commend it to the patronage of that part of our profession (small, let us hope) that have no sense of humor, or think it out of place in the law. On every page the work affords abundant evidence of good scholarship, liberal reading in many departments, and indefatigable research. The style is marred only by an occasional tendency (possibly learned from the present writer) to bad puns. One of the best quoted puns is attributed to one of the strangest legal characters who ever flourished in this country. In an election case, in the city of New York, Judge Brady remarked, "All we want is an honest count." "Thereupon arose in the bar a tall, strange figure, put his hand on his heart, bowed low, and in sepulchral tones said, "'May it please the Court, *Ecce Homo!*'" It was undoubtedly a perfectly unconscious pun. In his paragraph on "Hibernicisms in Statutes," Mr. Burnham has omitted the funniest that ever was, which he might have found in an early volume of the "Albany Law Journal." It is in the New York statute allowing commutation of, and deduction from terms of sentence to imprisonment, so many months in a year, when earned by good behavior. The act closes with a saving clause that it shall not apply to the case of any person sentenced to imprisonment for the term of his natural life. Mr. Burnham's reminder of the grouping in statutes of "infants, lunatics and married women," is surpassed by an old New York law which exempted from taxation "priests, paupers, lunatics and idiots." The volume is furnished with a most excellent index of eighty-six pages, the only defect in which, so far as we can discover, is one that is extremely flattering to the present writer, namely, a failure to cite more than a third of the references in the text to the present writer. Mr. Burnham is quite excusable for getting tired of it, and we only hope that the numerous references in question may not discourage anybody from buying his book. We venture to say that, aside from this matter, the volume will prove as well worth the price as any ever issued, and of more permanent value than most, for wit and humor never go out of fashion, and the cases cited are mostly of a perennial character.

NOTES OF CASES.

NEGLIGENCE OF THEATER OWNERS. — In Butcher *v.* Hyde (curious collocation of names!), 10 Misc. 275, the city court of Brooklyn held the defendant liable for an injury to an old lady who tripped on a loose rubber covering of the stairs of his theater. In a recent New York case, where a spectator fell from the top gallery into the pit, it was held that the owner was under no duty to put a railing on top of the parapet, although the seats were on an incline of thirty degrees. This reminds one of the anxious Israelite, whose young son fell from the gallery into the pit, and who leaned over the parapet and cried, "Shakey! come out of dat! It costs a tollar town there!"

MENTAL SUFFERING. — The Texas doctrine that damages are recoverable for mental suffering caused by the failure to deliver a telegram, calls out a vigorous protest in Francis *v.* Western U. Tel. Co., 58 Minn. 252, where the Court observe: "The 'Texas doctrine' has been favorably referred to in many of the more recent text-books, but the Bench and Bar will understand of how little weight as authority most of these books are, written, as they very frequently are, by hired professional book-makers of no special legal ability, and who are usually inclined to take up with the latest legal novelty for the same reasons that the newspaper men are anxious for the latest news." "No lawyer as yet seems to have had the

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temerity to present such a case to a court of last resort in any of the Eastern or Northwestern States." (Possibly because the inhabitants of those States are less emotional than those of the Southern and Southwestern.) The Court call it a "Pandora box," and predict that if it were established, "the chief business of mankind might be fighting each other in the courts." The doctrine, it seems, prevails in Alabama, Kentucky, Tennessee, North Carolina, and Indiana, but is discarded in Georgia, Mississippi, Florida, Missouri, Kansas, Wisconsin, the Dakotas, Arkansas, and in the lower Federal courts. The Texas doctrine was recently extended to a case where an express company failed to transport by a shorter possible route than its usual one, and it being late for the prepared obsequies, was "buried darkly at dead of night," only twenty-five or thirty persons being present, and no view of the body being practicable except the face through the glass. A verdict of $2,000 for mental anguish was approved. (Wells, Fargo & Co.'s Express *v.* Fuller, 35 S. W. Rep. 824.) In a late North Carolina case a verdict of $2,000 for mental suffering was sustained.

ANIMALS. — In our assumed position of general protector of animals at law, we have two English cases to report which have a humanitarian aspect. One of these, in a lower court, decides that one may not set poisoned meat to kill cats trespassing on his pigeon-house. He may not do so at common law, and he clearly may not do so under a statute permitting the laying of poisoned meat to destroy rats, mice, and such small deer. If he had caught the cat *in flagrante delicto* doubtless he might have slain it, but he must sit up o' nights and watch his opportunity. Truly the cat has nine lives. The other case (Osborn *v.* Chocqueil [1896, Q. B.], 31 L. J. 384) holds that one may not recover damages for the bite of a dog upon proof that the owner knew that the beast had worried a goat to death. Russell, L. C. J., and Wills, J., were of opinion that it must be shown that the dog had a ferocious disposition toward mankind.

SCRIPTURE IN COURT. — In Peabody *v.* State, 72 Miss. 104, a conviction of being a common prostitute was affirmed upon the authority of Solomon. The Court said: "The character of these appellants was graven with 'the point of a diamond on the rock forever,' some centuries since, by an unerring artist, as will at once be seen by the marvelous correspondence between that character, as thus sketched, and as reflected in this record." Then the greater preacher, Whitfield, J., quoted Proverbs, chap. vii, 6–23, and concluded: "The portrait is accurate; its colors have lost none of their vividness in the lapse of centuries; and upon the authority of this great text, reflected in all the text-books and decisions, the judgment is affirmed." It is rather rough to convict one of being a common prostitute upon the authority of the concubinous Solomon.

"PLACES OF ACCOMMODATION AND AMUSEMENT." — In Cecil *v.* Green (Illlnois Supreme Court), 43 N. E. Rep. 1104, it was held that a druggist's shop is not "a place of amusement or accommodation," within a statute prohibiting the denial of any person of "the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, eating-houses, barber-shops, public conveyance on land or water, theaters and all other places of accommodation and amusement," and that the penalty provided by the statute could not be recovered from a druggist who refused to sell a glass of soda-water to a colored person. The Court applied the maxim *ejusdem generis*, and observed: "Such a place can be considered a place of accommodation or amusement to no greater extent than a place where dry goods or clothing, boots and shoes, hats and caps, or groceries are dispensed. The personal liberty of an individual in his business transactions, and his freedom from restrictions, is a question of the utmost moment; and no construction can be adopted by which an individual right of action will be included as controlled within a legislative enactment, unless clearly expressed in such enactment, and certainly included within the constitutional limitation on the power of the legislature. Nothing in this provision requires a physician to attend a patient, a lawyer to accept a retainer, a merchant to sell goods, a farmer to employ labor, unless of his own volition, regardless of any reason, whether expressed or not."

ILL-FAME. — In State *v.* Plant, 67 Vt. 454; 48 Am. St. Rep. 821, it was held that under a statute punishing the keeping of a house of ill-fame, it is not necessary to show its bad repute. The contrary, said the court, "amounts to saying that however bad the house is in point of fact, it is no offense under the statute to keep it if it has not an ill fame. This is keeping clean the outside of the house, while the inside is full of prostitution and lewdness. Certain ancient sects did like things, and a woe was pronounced upon them for it by the highest authority."

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The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

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

LEGAL ANTIQUITIES.

IN the year 1598, Sir Edward Coke, then Attorney-General, married the lady Hatton, according to the book of Common Prayer, but without banns or license; and in a private house. Several great men were there present, — as Lord Burleigh, Lord Chancellor Egerton, etc. They all, by their proctor, submitted to the censure of the Archbishop, who granted them an absolution from the excommunication which they had incurred. The act of absolution set forth, that it was granted by reason of penitence, *and the act seeming to have been done through ignorance of the law.*

FACETIAE.

An honest old blacksmith down in Texas, despairing of ever getting cash out of a delinquent debtor, agreed to take his note for the amount due. The debtor wished to go to a lawyer and have the document drawn up, but the knight of the anvil, who had been a sheriff in days gone by, felt fully competent to draw it up himself. This he proceeded to do with the following result: —

"On the first day of June I promise to pay Jeems Nite the sum of eleving dollars, and if said note be not paid on the date aforesaid, then this instrument is to be null and void and of no effect. Witness my hand, etc."

LORD NORBURY had frequently observed a low prisoners' attorney touting in the dock for business amongst the prisoners, and was determined to punish him. So, on one occasion, as the attorney was climbing over the rails of the dock, after conferring with the prisoners, his lordship, pretending to mistake him for a prisoner, called out to the gaoler: —

"Gaoler, put that man back — one of your prisoners is escaping."

Whereupon the gaoler thrust the lawyer back into the dock; but having worked his way to the front of the dock, he addressed the judge, when the following conversation took place between them:

ATTORNEY. — "My lord, there is a mistake. I am an attorney."

LORD NORBURY. — "I am very sorry, sir, indeed, to see a gentleman of your respectable position in the dock as a prisoner."

ATTORNEY. — "But, my lord, I have not committed any crime."

LORD NORBURY. — "Oh, sir, I have nothing to say to that; *that* must be decided by a jury of your countrymen."

ATTORNEY. — "But, my lord, there is no charge, no indictment against me."

LORD NORBURY. — "Then, sir, you will be discharged by public proclamation at the end of the assizes. (To the gaoler.) Gaoler, put back that prisoner."

Whereupon the officer thrust back the limb of the law, and kept him until the rising of the Court, when his lordship sent to the gaoler a message instructing him to let him out.

IN an examination of a talesman as to his qualifications to serve as a juror, the following question was put: —

"If, after you had heard all the evidence in the case, you had a reasonable doubt as to whether or not the defendant was guilty, that is, you could not make up your mind conclusively that he was guilty, what would you do?"

THE WOULD-BE JUROR (after reflection): "Vell, under them circumstances, I would disagree."

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JUDGE. — "I see by the records that you have been here before for treating your mother-in-law cruelly. Were you punished?"

PRISONER (mournfully). — "Yes, your Honor, but not by the Court."

HALF a century ago the Common Pleas Court sitting at Syracuse, New York, heard discussed the question whether a coffin was cabinet ware. A furniture dealer had given a note "payable in cabinet ware," and having quarreled with the holder of the note pending its maturity, finally tendered a coffin. Much testimony was given as to what was meant by "cabinet ware"; but the county judge finally decided that a coffin answered the description, on the plea that it was a lasting clothes press. Whereupon the victim of the cabinet maker shrouded himself in the gloom of a bill of costs.

THE late Judge Amasa J. Parker of Albany was as waggish as he was learned. Having had a five days' trial of a breach of promise case, the jury disagreed and averred that a verdict was impossible. Said Judge Parker, "This is unfortunate; and I am sorry for the uncomfortable night you have passed; but I have a circuit term to hold in New York which cannot take longer than a fortnight, when I shall return to receive your verdict, if by that time you have reached one. Meanwhile I shall direct the Sheriff to make you as comfortable as circumstances will permit." The foreman stared at his fellows, and they glared at him: but the foreman, recovering his presence of mind, scurried up and down the row of double sixes, and in a few minutes announced a verdict for the defendant. But the fair plaintiff obtained from the appellate court a new trial, on the novel ground that the Judge had coerced the jury.

NOTES.

RECORDER GOFF of New York City declines to allow a recommendation to mercy by a jury to become matter of record, thus following an English custom; but in 1856, before one of his predecessors, a jury recommended, with a verdict of guilty, that the convict receive the longest sentence. This was placed upon the record as showing the responsibility for it.

IN a recent trial of an indictment against a fat-rendering establishment in Long Island City, a complaining witness on cross examination was asked how strong was the odor. He replied in a very decided tone, "So strong that it often stopped my clock." So a nuisance can become, as well as procrastination, a thief of time.

THE following is one of the head-notes to the case of Barrow *v.* Richard, 8 Paige, 351:—"A very highly *colored* description of the noxious effects of coal-dust, in a sworn bill in chancery, although somewhat poetical, cannot be treated by the court as a mere poetic fiction, but upon demurrer to the bill, such coal-dust will be considered a real nuisance."

"The Chancellor: 'The allegation in the bill on this subject, though it is a little poetical, cannot be considered a mere poetical fiction; as it is sworn to by the complainant and is admitted by the demurrer. He there stated that large quantities of volatile and offensive dust and smut from the coal rise in the air, and are diffused by the wind, into the premises of the neighboring inhabitants. And in spite of all their care, such coal-dust and smut not only settles upon their walks and their grassplats, but also on their fragrant plants and flowers, "beclouding the brightness and beauty which a beneficent Creator has given to make them pleasant to the eye, and cheering to the heart of man." But what must be still more offensive to the ladies of the neighborhood, "this filthy coal-dust settles upon their doorsteps, thresholds, and windows, and enters into their dwellings, and into their carpets, their cups, their kneading-troughs, their beds, their bosoms, and their lungs; discoloring their linen and their otherwise stainless raiment and robes of beauty and comfort, defacing their furniture, and blackening, besmearing and injuring every object of utility, of beauty, and of taste." Making all due allowance for the *coloring* which the pleader has given to this naturally *dark* picture, it is perfectly certain that this keeping of a coal-yard upon any of these lots is a business offensive to the neighboring inhabitants, according to the spirit and intent of these restrictive covenants."

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Let no young lawyer be timorous because of stage fright on his first argument or jury address. We have it from Cicero thus: "When I was young at the forum, I was so faint at opening an impeachment, and so confused in utterance, that Quintus Maximus laid me under an infinite obligation by dismissing the court as soon as he saw me totally debilitated and half dead from fear." John A. Collier along in the forties had become one of the most eminent jury lawyers in New York State, and renowned for ease in speech and eloquence, yet on first arguing a case in court at Binghamton he began by addressing the bench of judges as "gentlemen of the jury," changed it to "fellow citizens," and proceeded under painful embarrassment. When he concluded what he had to say, he turned to the nearest lawyer and said audibly, "Do you know where I can charter a knot-hole for a few hours?" Which the Judge overhearing, smilingly and assuringly said, having noticed Collier's embarrassment, "Never mind the knot-hole, young man, for you may have given us a loop-hole for a decision in your favor."

Dunning, afterwards Lord Ashburton, the opponent of Webster in the diplomatic boundary affair, on his first speech entirely broke down and was obliged to retire, his opposing barrister saying aside, "Stage fright has undone young Dunning."

Judge Benton of western New York, while walking towards the town court-house, was joined by a farmer who said, "My name is Benton, too, and I have a case before you to-day."

"Oh, in that case," said the Judge, at once divining the object of the familiarity, "Oh, in that case, I shall have to excuse myself, for I must not preside over the case of a relative." Later, when court opened, the litigant, who meanwhile had consulted with his attorney, sidled up to the Bench and softly said to Judge Benton, "I find after all, Judge, that our families are not related. The Judge, speaking out loudly, rejoined, "I am very glad to hear that, for I should greatly dislike to be a relative of a suitor mean enough to attempt influencing a judge." Nevertheless, the latter, during hearing of the chagrined man's case, treated it with marked impartiality.

Judge Martin Grover, a very witty member of the old Court of Appeals in New York, while he was a Supreme Court judge at nisi prius, neatly turned a sophistic point made by a lawyer and asked, "What do you think of that?" The latter was a man of great presumption and of rude humor, and he answered, "I think it's all in my eye, Betty Martin" — punning on the christian name of the Judge, who, without the slightest sign of annoyance at the vulgar familiarity, said, "The phrase you used has an ecclesiastic origin — do you know it?" Upon which the lawyer, recalled to his better self by the reproving silence in the room, responded that he did not. When Judge Martin Grover, with the humorous twang peculiar to his voice, added: "An English sailor at Gibraltar on a Sunday, which happened to be the saint's day of Saint Martin, attended the Catholic Cathedral, where was sung a mass in which continually recurred the refrain of the Latin hymn 'Ah mihi beati Martini,' which was intoned very frequently. When the sailor returned to mess and was asked how he liked the service, he said 'there was too much all my eye Betty Martin' — for so the Latin words had sounded to him. And practically you, in using the phrase, have called me the beatified Martin, for which compliment I thank you. Now proceed with your case."

It is not generally known to the legal profession that the poet Tom Moore, when the court in his day laid down the dictum "greater the truth, greater the libel," thus apostrophized it:—

> A jury — saints all snug and rich,
> And readers of virtuous Sunday papers —
> Found for the plaintiff. On hearing which
> The devil gave one of his loftiest capers.
> For oh, it was nuts to the Father of lies
> (As this wily fiend has been named in the Bible)
> To find it thus settled by judgment so wise
> That the greater the truth, the worse is the libel.

The Jarndyce suit commemorated by Dickens, was, as he told his namesake son, suggested as to its continuity by the Berkeley peerage case, that began in 1416 and ended in 1609 — a contest over the castle and barony of Lord Berkeley.

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LITERARY NOTICES.

THE complete novel in the July issue of LIPPINCOTT'S is "A Judicial Error," by Marion Manville Pope. It is a strong story, based on a murder for which the wrong man was convicted and hanged. He has a friend who determines to prove his innocence, and does it. This plot involves some exciting scenes and situations, and the author has not been slow to improve her opportunities.

THE BOSTONIAN for July opens with the important announcement that, beginning with the August number, the publication will henceforth be known as the NATIONAL MAGAZINE. This step is eminently well-advised, as the magazine itself has for some time been a coming periodical in the cosmopolitan field, but has been handicapped considerably by the local character of its original name. The leading article in importance in the current issue is an account of "The Recent Olympian Games," by George Horton, the American consul at Athens. Photographs taken on the spot form the illustrations.

EDWIN LAWRENCE GODKIN contributes to the July ATLANTIC a striking paper entitled the "The Real Problems of Democracy." This article is written apropos of Mr. Lecky's recently published book, "Democracy and Liberty." To this subject Mr. Godkin brings an unusual fund of information, and he writes in a manner at once so comprehensive and so clear, that his contribution becomes one of the most notable magazine articles of the month.

"THE Declaration of Independence in the Light of Modern Criticism," by Moses Coit Tyler, Professor of History in Cornell University, possesses a well-considered timeliness as the opening article in the NORTH AMERICAN REVIEW for July. Professor Tyler discusses this venerable and "classic statement of political truths" from many standpoints, but always in a loyal and patriotic spirit. A strikingly suggestive topic is most ably treated by the Hon. Charles W. Stone. In "A Common Coinage for all Nations," Mr. Stone advocates a coinage universal in character, stable and permanent, based strictly on international compact, and that would carry the badge of civilized life into every clime.

IN addition to Mrs. Humphry Ward's serial, the July number of THE CENTURY contains the first part of Mr. Howells' new novelette, "An Open-Eyed Conspiracy," characterized as "An Idyl of Saratoga"; a story of Georgia by Richard Malcolm Johnston; a romance of the Chinese quarter of San Francisco, "The Pot of Frightful Doom," by Chester Bailey Fernald, author of "The Cat and the Cherub"; a story of New England life by Frank Pope Humphrey, called "A Comedy of War," besides a group of crisp little allegories by Mrs. Edith Wharton of Newport, under the title "The Valley of Childish Things, and other Emblems."

SENATOR HENRY CABOT LODGE, in the July HARPER'S, does not acquit American politicians of corruption, but he does show that they are not alone in their fraudulent practices. He arraigns the English politicians for dishonesty in elections, and the British public for brutality and personal vindictiveness in campaigns. Senator Lodge's authorities for his criticisms are his personal observation and the leading British newspapers. His article, in short, holds up a "horrible example" from which American politicians and political newspapers could take profitable warning.

THE most thorough and authentic study of William McKinley's character and career that has yet appeared in periodical literature is contributed to the July REVIEW OF REVIEWS by Mr. E. V. Smalley, the well-known journalist, whose intimate knowledge of Republican party politics and long acquaintance with the public men of Ohio render him peculiarly adapted for such a task. Mr. Smalley was himself born and reared on the "Western Reserve," only forty miles from McKinley's Poland home, and he writes with full personal knowledge of the Major's early environment. The article is well illustrated.

ONE is always sure of finding in APPLETON'S POPULAR SCIENCE MONTHLY much that is helpful in making the most of the life we are now living, both in private and social affairs. The July number opens with a useful lesson on "Taxation," contained in the experiences of India, which are set forth by the Hon. David A. Wells. The strength and weakness of our banking system are shown by Logan G. McPherson. Prof. W. R. Newbold has an article on "Suggestion in Therapeutics," or the influence of the mind in aiding the cure of disease. On a related subject is Dr. Douglas Graham's account of "Massage in Sprains, Bruises, and Dislocations." A novel "System of Polar Exploration" is proposed by Robert Stein, the essential feature of which is a permanent station at a place in the Arctic regions reached yearly by whalers.

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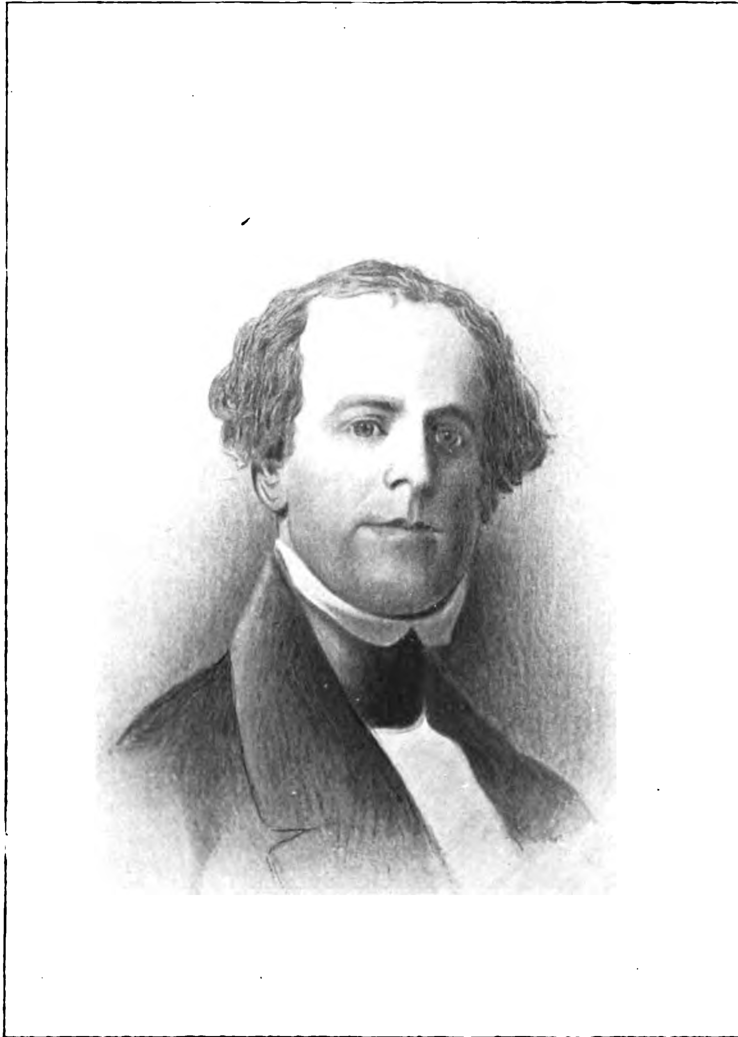

S. S. Prentiss

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The Green Bag.

VOL. VIII. No. 9. BOSTON. SEPTEMBER, 1896.

SERGEANT SMITH PRENTISS.

By A. OAKEY HALL.

Thence to the famous orators repair,
Those ancients whose resistless eloquence
Wielded at will that fierce democratie.
— MILTON, *Paradise regained*, *Book* 4, *line* 267.

"RESISTLESS eloquence" is an apt phrase to apply to Sergeant S. Prentiss; who, born in Maine, of noted Puritan ancestry, eighty-eight years ago — and now forty-six years dead — educated at Bowdoin college; a law student with the late Judge Josiah Pierce of Gorham; emigrated to the South, and during two decades stood therein *primus inter pares* at the bar of Mississippi and Louisiana; and who at the age of twenty-five fairly electrified the Supreme Court at Washington, in an argument by which he won the attention of Chief-Justice Marshall, who disdained oratory in his court.

I was an academy boy, preparing for college in Newark, New Jersey, when the preceptor — it was during the heated presidential campaign of 1840, between President Van Buren and Tippecanoe and Tyler too — said to the class: "You may have holiday this afternoon, and with me attend a Whig mass meeting in the Park, where a Southern Congressman named Prentiss, whom Daniel Webster has pronounced to be the greatest orator of the era, is to make a speech. And if he sustains his reputation, and the Websterian encomium, the event will become one for you to always remember. We have lately been reading about ancient Demosthenes, but let us go and hear a modern Demosthenes."

The event proved to be one for me to always remember; and six years later, while a student of civil law at New Orleans, in the office of John and Thomas Slidell, I again heard the "resistless eloquence" of him whose voice and impassioned delivery had in the Newark Park captivated my youthful imagination.

I beg to pronounce him the greatest of legal orators, next to Rufus Choate, to whom I often listened when at Harvard Law School, where I had matriculated under Joseph Story and Simon Greenleaf as professors; and with after-President Rutherford B. Hayes in my class and at my boarding mess.

In infancy, Prentiss, like Byron, suffered from a deformed foot, but, like Byron, he possessed in manhood a remarkable head, and even a teeming brain. I recall him, on all public occasions, either leaning upon a cane, or grasping a chair for support with one hand, while he gracefully gestured with the other.

After admission to the Bar of his native Pine-tree State, and desirous of aiding the *res angusta domi* of his family — its head, his father, having deceased while the son was collegian — he restlessly longed, like many a New England youth, for early participation in the battle of life. Wherefore he emigrated to Natchez, in Mississippi, to become tutor in a planter's family, for sustenance while preparing to join its local Bar. He was soon re-admitted; and having been almost immediately assigned to defend *in fórma pauperis* an accused, he displayed, in procuring from a rural jury an acquittal, such surprising eloquence that, like Henry Erskine, he at

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once by his first case won prestige and patronage,

His was a joyous, magnetic nature; he was endowed with a wonderful memory; he read avidiously not only legal works but those in all departments of literature; he was gifted with exuberant fancy, but did not however sacrifice logic to imagination; he was apt at illustration, ready with either good-natured repartee or scathing sarcasm, accordingly as circumstances prompted; he owned emotional eyes and a voice of many pitches and tones; and he was an admired conversationalist. These were all recommendations to success in his profession; and they became speedily recognized by legal associates and business clients.

His second case in court was upon a brief of an old practitioner, who was unable to personally attend to the contention that it involved — General Felix Houston. The case was to be heard at Brandon, then a small inland town ten miles from Jackson, the State capital, and in the very backwoods of the State (*tempo 1829.*) When the case was called he answered that he appeared for General Houston, and began to state that the controversy stood on demurrer, and then started to outline his argument, when the judge, staring nonchalantly at the slight-made, beardless boy, extremely youthful looking, by no means physically imposing, short of stature and leaning on a cane, interrupted him with, "Stranger, I have views against you on that point already; and I do not wish to hear argument on the subject." Whereupon young Prentiss modestly but firmly insisted on his client's constitutional right to be heard before the case was adjudged. As he proceeded, the judge thawed, and from becoming a polite, remained an eager, listener to a speech that fairly astonished the bystanders. The judge was, it seems, well addressed as "Your Honor"; for to his honor be it said, he was not only convinced but admitted it; and so the young stranger won his legal spurs. The anecdote is related on authority of William C. Smedes, whom lawyers may recognize as one of the old State reporters. The result was that General Houston immediately offered Prentiss partnership, with a third interest in his old established business. From that time onward, the youngster's progress at the bar was rapid; and so profitable that he was able to abundantly care pecuniarily for his mother in her declining years, for his adored sisters and his younger brother George, at that time in college and who subsequently became as eloquent in the pulpits of New York City as was Sergeant at the bar. And between the two was even more than the love of Biblical Jonathan and David.

The young lawyer, although lame, could occupy the saddle, and his circuit journeys, in days when vehicular roads were few and railways unknown, were always upon horseback, with his papers and books in the saddlebags. On all these journeys he made friends, and enthusiastic ones. At tavern or cabin he was warmly welcomed, and listened to with admiration. One of his repartees was long current in Yazoo County. "Young man, you won't get much practice in this parish, for we have no jail." "Then," responded Prentiss, "that must be either because everybody is virtuous or else that the rogues are in such a large majority that they decline out of self-defense to build or buy a lockup."

He remained practitioner at Natchez during four years; and then (*tempo 1832*) removed to Vicksburg, which was fast overtopping Natchez in population and wealth. His first case there was resisting an ordinance which cut off the hotel of his client by quarantine because it had recently contained a small-pox case. The ordinance forbade the client from leaving his hotel, and all others from entering it. There was a question of *ultra vires* in the Council to pass the ordinance, which during two hours Mr. Prentiss sustained in an argument replete with metaphor, satire and logic; and he succeeded in having the prohibitory ordinance repealed.

About the same time he made his entrance

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into the political arena at a meeting of partisans opposed to President Jackson. But he directed his attack against the Vice-President Martin Van Buren. Referring to a claim that the latter, while minister to England, had settled the question of Great Britain's right to search American vessels, Mr. Prentiss aroused most intense enthusiasm by this eloquent sentence delivered with marked fire, scorn and passion. "Why, that question was settled by Madison's naval war; and even the youngest American sailor boy seated at a masthead, if asked by a Briton whether such right existed, would point to the mouth of the cannon on the deck below and indignantly exlaim, 'Go thence and take your answer.'" "Even," said Judge Chilton, who was in the audience, "his political adversaries in the nationality of the sentiment forgot partisan bitterness and united in the exclamations of applause."

In October, 1833, after a legal contention in which he was opposed by Henry S. Foote of the Bar (long afterwards Governor, and Federal Senator of Mississippi, and one of the few Union men of the South), personal difficulties arose, and Foote challenged Prentiss. They met with seconds at sunrise on the Louisiana side of the river, opposite Vicksburg. Foote was slightly wounded in the shoulder. But Foote renewed the challenge and was again wounded. In after years they became intimate friends — each perhaps sharing the sentiment expressed by old General Damas, in Bulwer's play of "Lady of Lyons," in "Egad, it is strange how much I like a man after I have fought him." In writing to his clerical brother an account of the duels, Prentiss said, "I am no advocate of duelling, and from principle shall always, if possible, avoid the custom; but here, if a man don't fight, life is rendered valueless to him both in his own eyes and those of the community." He begged his brother to conceal the incident from his mother, because it might shock her. And she never learned of the matter until after her son's untimely death.

Nearly all of his compeers at the bar were Southrons, and many of them were jealous of him as a Yankee interloper; but when they discovered that he would fight, they were chary of giving him offense. But on one occasion, during a trial, when opposed by a member of the Bar named Claiborne, an altercation suddenly arose between them and the latter aimed a blow which Prentiss countered. The judge found both in contempt, and ordered each to be imprisoned for twenty-four hours in the county jail. Claiborne had attempted excuses, but Prentiss with infinite drollery acknowledged the justice of the conviction and punishment, but added, "I have a favor to ask of your Honor, that I shall not be disgraced by having to share a cell with my adversary." The Bar and bystanders were convulsed with laughter, and the judge controlled his own risibilities sufficiently to put them in custody of the sheriff, with the remark, "and separate cells." In the evening, many members of the Bar passed hours in Prentiss' cell, where supper was served and they enjoyed the exhaustless good humor of the captive. On the following day a concourse of citizens assembled at the jail to greet his release, and escorted him to the court house, where the interrupted cause was continued.

Naturally, Prentiss' popularity attracted to him political leaders of the Anti-Jackson party, and he was soon elected to the legislature, to which he was re-elected eight times, and served therein as chairman of the Judiciary Committee. He participated largely in the debates, and became always the oratorical feature of the assembly, although he had as fellow members many distinguished men. But he alternated court house and Capitol building, and did not permit the pursuit of politics to interfere with devotion to his constantly increasing number of clients. He accumulated surplus moneys and invested these largely in a speculative purchase of corporation lands in Vicksburg, the title of

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which was in dispute, and he was assigned to protect it for the civic government. It eventually reached the United States' Supreme Court (Vick *v.* the Mayor and Council of Vicksburg, 3 Howard, 464), where the defendants were beaten by a majority of the judges, and Prentiss lost land and improvement, which were valued at $150,000 — his all.

The Mississippi State reports between 1835 and 1845 teem with cases in which he was engaged, and in which he was generally as successful *in banco* as he had been at *nisi prius* with jurors. The State was anxious to convict a desperado named Cameron, for the murder of one Bird, a well known citizen; and later also to convict a highwayman, named Phelps. These were regarded as close cases, and Prentiss was associated with the Attorney-General. Both accused were convicted, and one of them on the slight circumstantial evidence of having in his pocket a scrap of an old printed song, of which another portion, capable of being deciphered, was found in the gun-wadding that was taken from the victim's wound. Prentiss summed up on that incident with great adroitness and power.

Another of his "star" *nisi prius* cases hinged upon the romance of a testator, whose will was contested in the form of a now obsolete action termed *devisavit vel non.* The plea against its validity was incompetence, through a mind broken by habits of intoxication, and because of death-bed signature; and the invalidity was sustained by the efforts of Joseph Holt, then a visiting young Kentucky lawyer, who during the Civil War, a quarter century later, became Judge Advocate, after having been a Cabinet Secretary. But he proved no match for Prentiss, who after an address to the jury sustained the will that gave a large fortune to the testator's early love, who had broken her engagement with him on account of his habits of intoxication, and who had married and become a widow. She was Prentiss' client, and relatives of the testator opposed the will, mainly upon its having been made *in extremis.*

The following is an extract from the impassioned address of Prentiss to the jury: "Gentlemen, at the approach of death, how often the mind will disperse its clouds, and the heart, however perverted by intemperance it may have been, will recover its purity. . . . In this testator's last moments, the remembrance of his early love shone across a dreary lapse of years; and the image on his dying eyes, of her he first loved, recalled the fond hopes of his youth, and under their vivid influence he had striven to redeem his errors by a noble generosity."

It was a curious compliment to his powers of persuasion that, when the foreman of the jury, after consultation, arose to announce the verdict, he at first framed it thus: "We find for Mr. Prentiss."

At the termination of his legislative life, Mr. Prentiss was elected at a special election to Congress. His seat was contested on a technical ground, and he lost it by the casting vote of Speaker James K. Polk, on a tie between Whig and Democratic members. His speech, on his own behalf, was so logical and eloquent that the Senate adjourned to hear its progress; and at its close, John Quincy Adams — the only Ex-President who ever sat in the House (although Andrew Johnson retired from the White House to the Senate Chamber) — warmly congratulated the orator.

Prentiss then went back to Vicksburg, and at the regular election was overwhelmingly returned, after he had in partisan parlance, "stumped the State," and enchanted the electors with his oratory. He made many speeches in Congress during his term of service, and these, as reported in the "Globe" (which is unusual on the average as to reported speeches), glow in type with the true fire of oratory. While Congressman, he

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made several appearances before the Washington Supreme Court, on briefs and retainers impelled towards him by the prestige of his oratory from many attorneys of record.

His high sense of personal honor and rectitude of purpose can be gauged by the fact that he refused to accept the per diem pay and mileage which had been voted to him when he first lost his seat; saying, "You shall not pay me for what you have denied me, and prevented me from earning."

While still in Congress, he defended in Kentucky his friend, Ex-Judge Wilkinson, who had been indicted for murder during an altercation forced upon him at a hotel. Public feeling was strong against him, and the evidence really placed him in a perilous position. Everyone present at the trial thought that he would be at least convicted of manslaughter in a low degree; but personal magnetism and remarkable oratory procured an entire acquittal.

In 1842, always theretofore shy in the society of ladies, and sensitive in society as to his lameness, he matrimonially succumbed to the charms of a beautiful Natchez belle, who as his wife rescued him from a growing tendency to occasional morbidness, and brightened his arduous life. She finally survived him.

During the two years succeeding his marriage, he devoted himself entirely to his profession, neglecting for the time political calls; and received retainers that summoned him to many adjoining States out of his own. His fame became essentially a Southwestern one. Any client, having a reasonably doubtful litigation, or any friends of an accused in desperate straits, who retained Prentiss, felt that the matter was already settled in the direction that he carried it. But the Presidential election of 1844 brought him again into the political arena. While in Congress he had become a very idolator of Henry Clay, who in the last named year had become the Presidential candidate of the Whig party, while the opposing one was Mr. Polk — that Speaker whose casting vote had denied Mr. Prentiss his first Congressional seat; and it may well be believed that in that behalf Prentiss's desires to see vanquished the man who had done him a political wrong doubled his desire to have Mr. Polk defeated. He actively participated in the campaign for Clay, and, when the latter was beaten at the polls — as all his party friends believed by electoral frauds in the City of New York and in the Plaquemine parish of Louisiana — felt sorely disappointed; the which his letter to his relatives in Maine despairingly showed.

By the decision of the United States Supreme Court, Prentiss became ejected from the valuable real estate in Vicksburg into which all his savings had gone; and in a financial sense he was ruined. But his oratorical power, his experience in his profession, and his Yankee pluck and persistence remained as capital. Coupled with his disappointment over the defeat of Henry Clay, and the loss of his estate, there ensued disgust at the repudiation by Mississippi of its bonded debt, the initiation of which certainly infamous idea — and which for many years excited abroad intense injury to American credit — he had, when in the legislature and in public addresses, strongly in turn repudiated and combatted. All these incidents combined to influence him to leave Mississippi and join the New Orleans Bar, where he had already argued cases before its Federal District Court.

He arrived in the Crescent City during November, 1845, one year before I reached it. His eclectic mind soon grasped the intricacies of the civil, the practice, and the criminal codes of Louisiana that were patterned after the code Napoleon and the institutes and pandects of Roman law; but with the *Lex Mercatoria* that chiefly concerned litigation in New Orleans he was already thoroughly familiar. Almost immediately, retainers

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of a valuable quality reached his office in Exchange Place. Instead of being jealously received, as had been the case upon his entrance into Natchez as a Yankee schoolmaster arrived to practice law, he was acclaimed by the Crescent City Bar; and it was composed of able professionals, among them the veteran John R. Grymes, the civilian Christian Roselius, the astute John Slidell, the impassioned Pierre Soule, Judah P. Benjamin (a trio who played conspicuous parts in the later Confederacy), the profound Alfred Hennen, the learned George Eustis (father of the present American Ambassador to France), Robert Mott, a pundit in commercial law, and Edwin A. Bradford (nominated later for judge of the United States Supreme Court by President Fillmore, but rejected through Southern Senators because of his alleged anti-slavery affiliations).

The celebrated Pelican Club of the city gave Prentiss on his arrival a dinner.

In the next month after his advent occurred an annual celebration of the landing of the Pilgrims by the local New England Society. The announcement that Prentiss would be one of the speakers at the banquet led to active competition for tickets. His speech on the occasion was regarded to be as famous a specimen of oratory as was that of Patrick Henry before the Virginia Colonial Assembly; or that of Daniel Webster at the Bunker Hill commemoration. It was soon printed in pamphlet form by the Society. The "Times" of the ensuing morning editorially remarked: "Mr. Prentiss was eloquent beyond compeer." His very opening sentences were fraught with the promise of the oratory that ensued. They read: "On this day, dear in sacred remembrance to the sons of New England, they from every quarter of the globe gather in spirit around Plymouth Rock to hang upon the urns of Pilgrim Fathers the garlands of affection and filial gratitude. The human mind cannot be contented with the Present. It is ever journeying through the trodden regions of the Past; or making adventurous excursions into the mysterious realms of the Future. He who lives only in the Present is like the brute, and has not attained human dignity." Prentiss then passed to an eulogy of the Puritans, compressing into sentences a wealth of historical association; and showering metaphor and apostrophes upon their deeds in language which now read, half a century later, as I now have them before me in cold type, stirs the heart to noble enthusiasm. And if the matter does that, what must it have been when to the auditors on the occasion was added his marvelous manner of oratory? When he next soared to a comparison of Carver, Bradford, Winslow and Standish with the Spaniards who colonized also, he exclaimed: "Let Mexico and Peru answer for Pizarro, who followed in the train of the great discoverer like a devouring pestilence. With imagination maddened by visions of boundless wealth, and shouting 'gold, gold,' to the very brutes of the undiscovered forests. Clad in mail he leaped upon the New World an armed robber. In greedy haste he grasped sparkling sand to cast it down with curses if he found the glittering grains were not of gold. Never in the world's history had the *sacra fames auri* exhibited itself with such fearful intensity. Pitiless as the bloodhound by his side the Spaniard plunged into primeval forests, and crossed rivers, lakes and mountains. No region, however rich in soil, delicious in climate, or luxuriant in production, could tempt the Spaniard's stay. In vain the soft breeze of the tropics laden with aromatic fragrance wooed him to rest; in vain smiling valleys covered with spontaneous fruits and flowers invited him to peaceful quiet; his accursed hunger for gold could not be appeased. Simple natives gazed upon him in superstitious wonder and worshipped him as a god. He proved to them to be one: infernal, terrible, cruel and remorseless.

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With bloody hands he tore ornaments from their persons, and the shrines from their altars; he tortured them to discover hidden treasure; he slew them that he might search, even in their wretched throats, for concealed gold. Well might the miserable Indians imagine that a race of evil deities had come among them more bloody and relentless than those who presided over their own sanguinary rites. Now, gentlemen, turn to the Pilgrims: tempted also by the glowing descriptions from Raleigh of his El Dorado. Well might his descriptions of the pleasant groves, the tame deer, the singing birds and natural riches in gems and gold have allured them to that smiling land beneath the equinoctial line. But they resisted the tempting charms. Putting aside considerations of wealth and ease, they addressed themselves with high resolution to the accomplishment of vindicating their principles and demonstrating to the world the practicability of civil and religious liberty."

I beg to offer these extracts as average specimens of the exuberant fancy and masterly rhetorical contrasts that accentuated every oratorical effort of Prentiss which it was my happy privilege many times to hear. He, Rufus Choate and Wendell Phillips were the only orators who ever seemed to me to have been exemplars of Daniel Webster's memorable definitions and now historic descriptions of eloquence. "It does not consist in speech. It must exist in the man; in the subject; in the occasion. It comes like the outbreaking of a fountain from the earth, or the bursting with spontaneous natural force of volcanic fire." Therein Webster described Prentiss.

In beauty of diction, even in conversation, or in his simplest address upon the most ordinary motion at the bar, Prentiss remained unexcelled. Even the matchless music of his voice charmed away the logic or truisms of an opponent. His magnetic manner was not to be described. In referring to Chatham did not Lord Chesterfield say, "His success turned more upon manner than matter; for success in oratory turns upon the pivot of manner"? The oratory of Prentiss reminded of the American eagle in full flight with sun-piercing eyes and storm-daring pinions.

After I arrived in New Orleans, never was an occasion lost to me of listening to Prentiss in court, no matter if he only arose to prefer a suggestion.

In the winter of 1847 I heard him in following a speech by Henry Clay, temporarily in New Orleans. They each addressed a great mass meeting called "in aid of Ireland, desolate with famine." The speech of the great American Commoner was intensely pathetic, and an eloquent plea; yet it seemed to be forgotten after Prentiss's address, which word-painted the horrors of famine. And the audience spontaneously and impulsively swayed toward the platform that he occupied when he had exclaimed: "You once nobly responded to oppressed Greece and struggling Poland; but within Erin's borders is an enemy more cruel than the Turk; more tyrannical than the Russian: Famine! The only weapon to conquer him is Bread. Load, then, ships with that glorious munition, and in the name of our common humanity wage war against the despot Famine." I wondered not that, after he had concluded, the merchants and well-to-do among the auditors again surged toward the platform to vie with each other in pressing cheques and bank-notes upon the treasurer of the Famine fund. Whatever of avarice or greed, or of sordid economy may have been in the multitude when he began, his eloquent appeals had charmed those human foibles all away, and in their place awarded the Mercy which "blesseth him that gives" as well as "him that takes."

A few months later I heard his address at the public reception of the volunteers returning from General Taylor's Mexican army and passing through New Orleans to

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their Western homes. Then, too, came his marvelous bursts of eloquence as he recounted the heroic deeds of his auditors. The entire speech is accessible in printed report, and no volume devoted to elegant extracts from American oratory would be complete without including it. The sentences of peroration that I now subjoin further display his unfailing beauty of diction and gems of expression: "Gallant gentlemen, you now leave us for your respective homes, where fond and grateful hearts await you. Everywhere you will have to run the gauntlet of friendship and affection. Bonfires are kindling upon an hundred hills. In every grove and pleasant arbor the feast is being spread. Thousands of sparkling eyes are watching eagerly for your return. Tears will fill them when they seek in vain among your thinned ranks for many a loved and familiar face; yet soon through those tears will shine smiles of joy and of welcome; even as the rays of the morning sun glitter through the dew drops which the sad Night hath wept."

Unfortunately, eloquence at *nisi prius* or before the learned Bench is seldom preserved in print, and in the era of the Law illustrated by Sergeant Prentiss, stenography was in its weak infancy; wherefore, except in the wonderful address of Prentiss that snatched Judge Wilkinson from the scaffold, no report of his Bar eloquence exists; and exemplars of his eloquence are to be drawn from elsewhere.

Yet, however grandly the sentences of his efforts in court might have marshaled each other in print, these must lack for their full effect the Prentiss manner; his high, smooth or corruscated forehead, his slight yet effective lisp, succeeded by sonorous utterance; his kindling eyes; his facial gestures; his dauntless glance of intellectual prowess, and his torrent fluency of speech, that was not only far beyond the common average, but to an extent rarely witnessed in the most distinguished speakers of England or of this country, or of even voluble France. But never a fluency that obscured or interfered with his meaning. A fluency so swiftly obedient, that each word answered the gentle summons of thought; and that fell into place so orderly and gracefully that whole sentences seemed to present themselves as so-many-syllabled words ready formed to his mind.

It is recorded that a friend once said to him: "You always mesmerize me when you speak"; and that he answered, "Then it is an affair of reciprocity, for auditors electrify me. I feel a preternatural rapture, new thoughts rush unbidden into my mind. I am as much astonished in my duality of brain at my own conceptions as any of my hearers; and when the excitement is over I could no more reproduce them than I could make a world."

There may be living in Boston veteran citizens who can recall the flavor of his oratory from a notable speech that he once made in Faneuil Hall; where, he afterwards said, the place seemed to inspire him.

I should sum up my estimate of his oratory by averring that his eloquent power was due to greatness of emotion, accompanied by a versatility which enabled him to assume readily any passion suited to his ends; added to which was perfection of the organs of expression, including the entire apparatus of voice, intonation, pause, gesture, attitude and play of countenance.

Early in 1850 his incessant professional work brought on feebleness and prostration, so that he could not eat or sleep except with difficulty; yet he kept at work. One case occupied him nearly three weeks, exposing him to the worst kind of winter weather. After toiling by day he would pass the night in pain and in fainting. Being a novice in illness, as is often the case with men of strong will and hitherto robust constitutions, he found it hard to submit to rules of prudence or to medical prescriptions. But while the body weakened, the

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mind remained as strong as ever. His illness compelled him to decline, in April, 1850, the invitation of the "Story Law Association of Harvard University," to deliver their first annual address. Prentiss regarded this invitation as the climax of his fame; for he was prouder of legal than of any other fame. And he was gratified to find that the honor was accentuated by the choice in his place of Daniel Webster, who also becoming ill gave way to Rufus Choate; whose memorable oration, with its high-toned national sentiments and rhetorical beauty, was almost the last reading which gratified the brain of his dying compeer, Prentiss. Prentiss was working to provide for whom he knew would be his widow, and their four beautiful children; and his indomitable will so conquered bodily pain and weakness that his last case but one, then involving title to municipal real estate, found him arguing it seated in court by permission of the judge. Federal Judge McCaleb, who heard the argument, has borne testimony to the systematic arrangement and masterful ability with which every point and all the learning that could elucidate the important questions involved were presented, notwithstanding the feeble frame. It was the dying effort of the fabled swan, and was successful. He lost the same kind of a case in Vicksburg and thereby beggared himself; but won for his old doctrines in New Orleans, and, to a large extent, thereby rehabilitated his estate.

His final professional effort was in defending General Lopez for alleged fillibustering in Cuba; but he left the court-room only to go to his country place near Natchez, where, on the opening of July, 1850, after hours of delirium, in which his talk was about law suits and raising money for his children, he passed into consciousness and recognition, and died in gentle infantile slumber, after repeating with the once eloquent and powerful voice, in feeble whispers, the touching petitions of the liturgy, attended by Episcopal Bishop Greene.

The memory of Sergeant Prentiss should ever be kept green by his professional brethren as a great lawyer-orator; and as full answer to a recent heresy of the Bar that eloquence, fervid manner, and all the accessories of oratory, are only wasted if used upon modern jurors and modern judges in a utilitarian age; and that any partnership between Themis and Mercury, the god of eloquence, has become incompatible in this *fin de siècle* age.

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FEMALE GAMBLERS.

By Andrew T. Sibbald.

NOTWITHSTANDING the fact that women are far too excitable for a business which requires the utmost coolness at all times, whether the gambler be winning or losing, there are facts on record which prove there have been instances in which women have evinced all the necessary dispassionateness which successful gambling entails. In Plutarch's "Life of Artaxerxes," an incident related of Queen Parysatis furnishes a case in point. In those days (about four hundred years before Christ) gaming with dice was a fashionable pastime at the Persian court, and as Queen Parysatis wished to revenge the murder of her favorite son, who had been slain by a slave named Merabetes, by order of Artaxerxes, she determined to utilize her well known skill at the dice to accomplish her cherished revenge. One day, therefore, she induced the king to play with her for a thousand darics (about two thousand five hundred dollars), and purposely allowed Artaxerxes to win. After losing the game Queen Parysatis played for a slave; the winner to select the slave which he or she required. The Queen won; chose Merabetes; tortured and killed him, and thus satiated her revenge.

Among the ladies of ancient Greece and Rome, there was but little tendency to any description of gambling. As a rule, the Grecian and Roman women were too deeply interested in their domestic concerns to devote time or energy to a business the very nature of which necessitated absolute singleness of purpose, and the complete annihilation of family cares. Even when the Roman women were corrupted under the baneful rule of Nero, they seldom or ever acquired the vice of gambling. Except during the festival of the Bona Dea, betting on any event or game was but little practiced, and even then the individual sums risked were comparatively trifling.

French ladies, unfortunately, have not always followed the good example of the women of Greece and Rome. At first, indeed, when French women began to succumb to gambling transactions, public opinion was so antagonistic to the departure that gaming ventures were carried out in the most secret manner possible. During the reign of Louis the Fourteenth, however, gambling transactions were conducted on a bolder scale, and under Louis the Fifteenth heavy betting was indulged in by French ladies with but little regard for the opinion of Mrs. Grundy. At the close of the eighteenth century gamestresses were as plentiful as blackberries, especially so among the higher classes, and their play was frequently characterized by unfairness and barefaced cheating. Yet in spite of their cheating propensities, the ladies were often losers. The reverse of fortune frequently reduced high-born dames to beggary, a condition which induced them to sacrifice not only their honor, but that of their daughters as well, in order to pay their gambling debts. As an illustration of the degrading position to which gambling may reduce women, the case of the Countess of Schwiechelt, one of the beauties of the opening years of the present century, is instructive. The Countess was much given to gambling, and while in Paris, on one occasion, she lost fifty thousand livres. Being unable to pay, she actually planned a robbery at the house of one of her friends — Madame Demidoff. Madame Demidoff was the fortunate possessor of a remarkably fine coronet of emeralds. The Countess of Schwiechelt by some means found out where it was kept, and at a ball given by Madame Demidoff she managed to

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steal it. The theft was discovered, and the Countess adequately punished. Many influential friends tried hard to have her punishment mitigated, but Bonaparte was inexorable, and left her to her fate.

In England, as in France, the passion for gambling has often reduced women of the noblest birth to the lowest depth of depravity. From allusions in old plays such as "The Provoked Husband," and from Walpole's "Letters" and other publications, it is evident that the sacrifice of honor was not an infrequent method of paying gambling debts. The stakes were generally high, and the debts incurred were a first charge on the sensitiveness of the unfortunate lady players.

So tender these — if debts crowd fast upon her,
She'll pawn her virtue to preserve her honor.

Hogarth, in his picture entitled "Piquet, or Virtue in Danger," realized exactly the female gambler's fall; and his truthfulness was amply testified to by frequent occurrences in actual life. A single illustration of these may suffice. A lady was married while very young to an English noble. Ere long she was introduced to a professional gamestress, was led into play, and lost more in a single night than ever she could hope to pay. Her honor paid the debt. Soon afterwards the gambler's boasts revealed the truth to the lady's husband, and a duel was the necessary consequence. The gambler was shot dead by the injured husband, after which the latter actually offered to pardon his wife, and wished to restore her to her former position. The wife refused, gave herself up entirely to gambling and its results, and the husband died of a broken heart.

The stakes for which ladies played during the closing years of the eighteenth and the opening years of the present century were often of considerable magnitude. In 1776, a lady in a fashionable quarter of London lost, at a single sitting — according to the "Annual Register" — no less than three thousand guineas at loo; and at Lady Buckinghamshire's faro table in St. James's Square, there were often enormous sums lost in play.

Lady Buckinghamshire, it may be remarked, was, perhaps, the most notorious gamestress of her day. She actually slept with a pair of pistols and a blunderbuss by her side for the protection of her cherished bank. Her career, however, was a somewhat chequered one. In the "Times" for March 13, 1797, there is a police-court report which goes to show that Lady Buckinghamshire's speculations were not always free from worry. A couple of days prior to the report her ladyship, together with Lady E. Luttrell and a Mrs. Sturt, was brought up at the Marlborough Street police-court, London, and fined fifty pounds for playing at faro; while Henry Martindale, her manager, was also mulcted in two hundred pounds. Later in the same year her croupier got into trouble over the disappearance of the cash-box. Awkward stories of stolen purses, snuff-boxes and cloaks began to be told, and, finally, Martindale became bankrupt to the tune of three hundred and twenty-eight thousand pounds, besides "debts of honor" to the amount of one hundred and fifty thousand pounds.

Lady Buckinghamshire, by the way, was not the only titled dame of the olden days who not only gambled, but kept gaming establishments. One of these professional gamestresses actually applied to the House of Lords for protection against police intrusion, on the plea that she was a peeress of Great Britain.

"I, Dame Mary, Baroness of Mordington," ran the petition, "do hold a house in the Great Piazza, Convent Garden, for, and as an assembly, where all persons of credit are at liberty to frequent and play at such diversions as are used at other assemblys ... and I demand all those privileges that belong to me as a peeress of Great Britain appertaining to my said assembly." The

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House of Lords very properly refused her request.

Among the many stories told about the ruling passion of gambling being strong in death, that recorded by Goldsmith will bear repetition, as it happens to refer to a female gambler. The story goes that an old lady, having been given up by the doctors, played with the curate of the parish "pour passer le temps." Having won all his money, she suggested that they should play for the funeral charges to which she would be liable. Just as she began the game death claimed its own, and as "time!" was called, the game was a drawn one. A similar submission to the ruling passion was evinced by the gamestress who, in the ordinary course of her religious duties, went to confess to her priest. Her confessor, among other arguments against the lady's favorite vice, expatiated on the loss of valuable time which gambling occasioned. "Ah," said the penitent with a sigh, "that is exactly what vexes me — so much time is lost in the shuffling of the cards!"

In the lower ranks of English life the passion for gambling is by no means confined to the male sex. In 1776, the barrow-women in London were in the habit of carrying dice, which they induced their boy and girl customers to throw for fruit and nuts. The evil grew to such an extent that the Lord Mayor took action in the matter, and put a stop to it for a time.

But the profession of female bookmaker is by no means extinct even now. In certain districts in London, Liverpool, and other large towns may still be seen the "lady" professional taking bets, ranging from a penny upwards, from women and children, who never saw a horse race in their lives, and who can have but the remotest idea of the pros and cons of the event on which they bet. Their bookmaking, of course, is done in the most primitive and unostentatious manner, yet it is hardly likely that the police are altogether ignorant of the methods of these female gamblers. If aware of them, it seems somewhat strange that efforts have not been made to annihilate one of the worst phases of street gambling.

Among the higher circles of the present day, the same gaming propensity is visible to those who choose to look for it.

Ladies are not ashamed to run horses under assumed names; nor is it an uncommon event to see some of the prettiest flowers of society settling up with a bookmaker in the most business-like manner.

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THE COUNTRY LAWYER IN ENGLISH PUBLIC AND SOCIAL LIFE.

BY EDWARD PORRITT.

THE place in which to study the lawyer in public and social life in England is one of the larger cathedral cities. A cathedral city is usually a county town, an assize town, a quarter sessions borough, and a market town; and is thus the center of the ecclesiastical, civil, and social life of the county. The country lawyer, the practitioner who in England is called the solicitor, is to be seen at his best in one of these cities. Such places afford a large amount of work of an exceedingly varied kind for the junior branch of the legal profession; and the size and settled character of the population give the lawyer excellent opportunities for becoming a figure in social and public life.

In these communities the profession of the law seems to carry with it more social consideration, and more social opportunities than fall to the lot of the ordinary solicitor or barrister in London. A lawyer in London is one of thousands of the same profession. He enjoys the place he has made in the law courts, and in and about the Inns of Court; but, if his home is in one of the suburbs, his social rank is not much higher than that of his neighbor who is a journalist, a stockbroker, a bank manager, or a merchant. When engaged in his professional duties, he is only one in a crowd; at home his social position has little to distinguish it from that of his neighbors who are not of an old, learned and exclusive profession. In a provincial city the case is different. There are seldom as many as twenty lawyers in one of these cities. From the nature of their work, most of them are much in the public eye, and those of any professional standing have prominent and well-defined places in the public and social life of the community.

The public life of a provincial city offers many opportunities for a lawyer in the direct line of his profession. There are few paid commissionerships, and in the smaller cities no stipendiary magistracies, but the well-paid clerkships open to lawyers, often confined entirely to them, are numerous. Some of these clerkships are peculiar in character, and owe their existence to the fact that in England service on all the local governing bodies is honorary. The members give their services, and the only highly-paid official is the clerk. This is so in connection with the county councils, established under the Act of 1888; with the borough councils, which came into existence under the Municipal Reform Act of 1834; with the boards of guardians for the relief of the poor, which carry out the provisions of the Poor Law of 1834, and it is also so in connection with the school boards, established under the Elementary Education Act of 1870.

The members of these various administrative bodies are elected directly by the local tax-payers. Each of these councils or boards appoints its clerk, who holds office during good behavior; practically for life. The clerks of the county councils and of the borough councils are always of the solicitor branch of the legal profession. The Acts of Parliament insist that the holders of these positions shall be learned of the law. Laymen may serve as clerks to the school boards and boards of guardians; but although these positions are open to laymen, a large number of them are held by lawyers.

As professional salaries go, in England, these clerkships are well paid. Clerks to county councils receive salaries ranging from £600 to £1,000 a year. The clerk of a municipal corporation in a city of 40,000 or 50,000 inhabitants will receive from £450

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to £600 a year. These salaries may appear small to American readers; but, it must be remembered that a house such as a lawyer in good practice in an English town would occupy can be rented for from £35 to £40 a year. The wages of his cook and housemaid are seldom more than £15 and £18 a year; and if he keeps a horse and carriage, he can have them and his garden attended to by a coachman whose wages do not exceed a pound a week. It frequently happens, too, that a lawyer who holds one of these official positions is allowed to take private practice. Sometimes, also, a lawyer is clerk to the school-board as well as to the town council, or he may hold in addition the position of coroner, an appointment which nowadays almost invariably falls into the hands of a lawyer.

Pluralists abound in these old English cities. The Socialistic element on the town councils and the school boards in the manufacturing towns has of recent years sought to throw some obstacles in the way of the pluralist in official public life. So far, however, with little result. When new appointments are made, the socialists and labor representatives can make their protest. Occasionally in these cases, the protests are effective, and a lawyer is frustrated when seeking to add to his public appointments. But, as has been explained, all the public offices which fall to the lot of the English public provincial lawyer are practically life tenures, and so long as a pluralist remains in quiet possession of what he has, his position is unassailable.

The mode in which summary justice is administered in England gives the local lawyer other opportunities in the way of legal clerkships. The local magistrates, like the members of the town council and the school-board, serve without pay. They are not lawyers. They are men in trade, or of landed property, who have time to give to public work, and apart from thus having time at their disposal, the only requirements of the magisterial office are common-sense, some elementary knowledge of the principles of law, and an acquaintance with the customs and habits of the people among whom they live. The clerk acts as the lawyer to the entire bench. He sits below the magistrates, and advises on all points of law. When all the evidence is in, he turns to the bench for a consultation, and then the chairman pronounces the judgment of the court.

In a city there are two of these magisterial benches, each with its own clerk and its own court-house. One serves for the borough and the other for the petty sessional division of the hundred of the county in which the city is situated. Offences occurring within the city limits are tried in the city court; those occurring outside in the country adjacent to the city are tried in the county divisional court. The work of the two courts is practically the same. Each disposes of cases coming under the Summary Jurisdiction Acts, and serves as a court of first instance for cases of a more serious character, which are going either to the quarter sessions or the assizes. The duties of a county bench are no more responsible or onerous than the duties of a borough bench; yet, there is a marked difference in the constitution of the two. Any man of good standing and known integrity may be a magistrate in a borough; but to be a county magistrate a man must be a land-owner. The law settles that point; and custom, tradition, and the etiquette of county social life have set up another qualification of a negative character. To be of the county bench, a man must not have engaged in retail trade. He may have followed the gentlemanly occupation of a brewer, in the days before the large limited liability companies made such a great business of brewing in England; his drummers and draymen may have peddled beer in casks to innumerable dirty little beer-shops in the back alleys of a manufacturing town; but

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if he has sold tea and sugar at retail, no matter how large a fortune he may have made in the business, and no matter how much land he has acquired with the money, there is no place for him on the county bench or in county society.

Efforts have repeatedly been made to break down this exclusiveness of the county benches. Three or four bills have been introduced into the House of Commons by Radical Members to this end. When the Parish and District Councils Act was passed in 1894, the Radicals succeeded in inserting a clause under which chairmen of district councils are, during their year of office, county magistrates; but with this exception, the landed gentry, the men who with their wives and daughters are received into the exclusive ranks of county society, are to-day as fully and completely in possession of the county bench as their ancestors were in the days when only freeholders had the Parliamentary vote in the counties, and when the landed families monopolized and controlled the representation of the smaller Parliamentary boroughs, and willed this control, or otherwise passed it from hand to hand, as they would an estate or a country mansion.

Each of these magisterial courts has a lawyer for its clerk, and with these courts the word and will of the clerk is law. The small-debt courts also have similar clerkships, open only to members of the lower branch of the legal profession. These courts are known as county courts, and in name at least, if not in all their functions, they perpetuate one of the oldest local institutions in England. The judges of them are all barristers of ten or twelve years' standing at the date of their appointment by the Queen, and receive salaries of £1500 or £1800 a year. They go a regular circuit, much as do the judges of Queen's Bench, spending a day in this town and a day in the next, hearing suits in which the value involved does not exceed £50. There is a clerk to each of these courts. His official title is that of registrar, and when the judge is sitting in one room, hearing cases of the character described, the registrar sits in another, disposing of the small-debt cases. Sums as low as ninepence may be recovered before the registrar.

Solicitors appear to plead before these three courts. With one or two exceptions, presently to be explained, these are the only courts in which a member of the lower branch of the legal profession can appear. When pleading in these courts, solicitors wear their black stuff gowns. The clerks of the magistrates' courts and the registrar of the county court usually sit at their desks, attired in their gowns. The judge of the county court is always in wig and gown. In some of the local police courts the regulations in regard to the wearing of gowns by solicitors are a little lax. Occasionally a lawyer appears in a morning suit with no gown; but there are few county court judges who will tolerate such laxity. Most of them are as insistent upon the dignity of their court and upon the dress of the lawyers who appear before them as are the judges in the High Courts in London.

In the county courts solicitors plead before the juries. Three men form a jury, and these diminutive juries are about the only ones on which a solicitor can try his forensic and oratorical talent. Sometimes solicitors attend coroners' courts, in which twelve men form the jury; but on these occasions their efforts are directed to watching what goes on the coroners' depositions, which are to go before the grand jury at the assizes, rather to any attempt to convince the jury. Barristers have the monopoly of jury practice in England. In a criminal case which is going to the assizes, the solicitor will attend at the court of first instance, and examine and cross-examine witnesses. His publie appearances in connection with the case, however, end at the local police court. His next step is to

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draw up the brief and instruct the barrister who is to defend or prosecute before the judge and jury at the assizes.

In one of these cathedral cities half a dozen or more courts are in session in the course of three months. There are the two local magisterial courts and the county and coroners' courts which I have described, and in addition the quarter sessions and the assizes. In a cathedral city there is always a consistory court; and should it happen to be a seaport as well as a city, board of trade courts are occasionally in session. Often in a city of this class there will be two courts for quarter sessions; one for the city itself and one for the hundred of the county in which the city is situated. At the quarter sessions for the city, criminal cases are tried before the Recorder. He is a barrister appointed for life, like the High Court judges, by the Queen, on the recommendation of the Secretary of State for the Home Department. He is in the city for three or four days every three months for the trial with juries of criminal cases which are too serious to be dealt with by the magistrates; but not of a sufficiently grave character to be sent to the assizes.

The Recorder's is a very ancient office, easily traceable back to the very beginnings of town life in England. Nowadays, in fact, the office is more ancient and honorable than highly paid; for the salaries rarely exceed £70 or £80 a year. Still recorderships are offices much prized by prosperous barristers. They give their holders a right to appear at the levees of Court, and when a barrister is still going circuit, they add to his social and professional standing in the counties through which he travels. The quarter sessions for the hundred differ in their constitution from the city quarter sessions. They are presided over by a chairman, who also is a barrister, and who usually receives a salary. The other members of the court are the county magistrates for the hundred. Numerous appeals in connection with the licensing laws and with local taxation come before these courts, and these cases provide quite a considerable amount of preliminary work for the local solicitors, and numerous briefs for the barristers who practice at these courts.

The Consistory Court, in which solicitors also practice, are held before the Chancellor and Registrar of the ecclesiastical diocese. Business in these courts is entirely of an ecclesiastical character, and for the most part consists of applications for faculties to make alterations in the fabric of churches. It is not possible to drive a chisel into the walls of a church, or to put in a pane of colored glass without a faculty from this court. Ordinarily the cases are of a very simple nature, but if there happen to be a few contentious people in a parish, and opposition is raised to a proposed alteration in the church, it is possible for a case in the Consistory Court to give rise to considerable profitable business for the lawyers.

Parliamentary elections always bring more or less work to the local lawyers. The most profitable of this work is in the Registration Courts. Every year in each Parliamentary constituency, a court is held to determine disputes as to claims to places on the roll of electors. The judges in these courts are barristers, appointed by the judges of the High Court in whose circuit the Parliamentary constituency is situated. Each revising barrister works his way through a group of constituencies, and sits day after day to determine disputed claims. These disputes have their origin with the registration agents of the Tory and Liberal parties.

Each political party endeavors to keep off the register of the constituency as many as possible of its opponents, and to put on as many as possible of its known partisans; so, when the revising barrister opens his court, he is confronted with a long list of claims and objections, put forward by each political party. In spite of three Reform Acts which have been passed since

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1832, the intricacies of English electoral law are bewilderingly numerous. Some of them are exceedingly peculiar. Days are occasionally spent in arguing and settling a disputed point, and every year numerous appeals are carried to the High Court in London. When a political party is in funds, it employs a lawyer to help it through the registration courts; when money is not so plentiful, the work is undertaken by a layman who has made himself an expert in electoral law. The registration court is the only one in England in which a lawyer may find himself confronted by a paid advocate who has neither been called to the Bar at one of the Inns of Court, nor passed the Solicitors' Examination of the Incorporated Law Society.

Another piece of work, profitable to the lawyer, is that of agent to a Parliamentary candidate. Laymen can and do undertake the duties of agent to a candidate at a Parliamentary election; but a candidate who desires to steer clear of the pitfalls of the far-reaching bribery law of 1883 and of the political libel law of 1895 usually appoints a lawyer to act for him. It is much cheaper to pay a lawyer's fee than to run the risk of the ruinous expense of a petition from the unsuccessful candidate on the ground of some technical contravention of the election laws. Every time Parliament interferes with the election laws, it digs new pitfalls for unwary candidates; and, as years go on, lawyers are necessarily getting a larger and a firmer hold on the business of the Parliamentary agent.

No account has been taken in this sketch of the clerkships to semi-public bodies, such as charity boards, and trustees to educational institutions, which fall to the lot of the country lawyer; but sufficient has been written to show the prominent position which the lawyer occupies in the public life of provincial England. Socially, too, his position is a good one. In these old English towns social lines are drawn with much rigidity. The lawyer, however, is usually on the right side of the line. He has his recognized place in county society, and he and his wife and daughters are on the lists for county balls and other exclusive assemblies at which the merchant or the manufacturer seldom by any chance appears. He ranks with the clergyman, and with the army officer, and as a member of a learned profession has the entrée to places to which mere wealth, no matter how great, would never afford a passport.

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THE ENGLISH LAW COURTS.

VII.

THE PROBATE, DIVORCE AND ADMIRALTY DIVISION.

THE Probate, Divorce and Admiralty Division exercises the jurisdiction formerly vested in the Probate Court, the High Court of Admiralty, the Court for Divorce and Matrimonial Causes. We shall say something about each of these tribunals in turn.

The Court of Probate was established in 1857 by a statute (20 and 21 Vict., ch. 77) which transferred all the jurisdictional authority of the ecclesiastical courts in respect of the granting and revocation of probate of wills and letters of administration in England to a secular tribunal sitting in London, and presided over by a judge ranking with the judges of the superior courts of common law, and as judge ordinary of the Divorce Court, taking precedence next after the Lord Chief Baron. The institution of the Probate Court removed two grave difficulties in the administration of the law testamentary. Formerly its function of determining the person to whom the administration of the estate of a deceased person was to be committed was exercised by different courts throughout the country, the question depending mainly on whether the deceased had personal estate (*bona notabilia*) within the jurisdiction of the particular courts. This rule gave rise to complication and uncertainty. It was abrogated by the new regime, under which the Probate Court, by means of registries in London and in the provinces, could grant probate and letters of administration in all cases where a person died leaving personal estate in this country. Again, under the old law the probate of a will was binding only on a testator's personal estate, even if he had appointed an executor and formally devised his lands by the will. The result was that the same testament might be held valid as regards personal estate in the ecclesicastical courts, and invalid as regards real estate in an action by the heir at law against the devisee. Under the act of 1857, this mischief was met by making the heir at law or other persons interested in the real estate parties to proceedings for probate, and thereby binding them by the decree pronounced by the court. The business of the Probate Court was partly common form or non-contentious, and partly contentious. The common form business consisted of the grant of probate or administration in uncontested cases, and of questions for the determination of the court on points of practice — as, for example, whether documents are sufficiently executed to be entitled to probate, whether obliterations, etc., are of such a character as to prevent a will from being proved, and whether a lost will was lost under such circumstances as to give rise to a presumption that it had been revoked. The contentious business included due execution, testamentary capacity, undue influence, fraud, and other matters of the same litigious description.

The Court for Divorce and Matrimonial causes, established by the statute 20 and 21 Vict., ch. 85, deserves a longer notice. Down to 1857 the marriage compact was by English law indissoluble, except by the Legislature. The Reformers had held and inculcated a similar doctrine, deduced from their repudiation of the Roman Catholic doctrine that marriage was a sacrament, and one or two persons were divorced *a mensa et thoro* in the sixteenth century. But in the year 1601, in the case of Sir J. Foljambe, the question came directly before the Court of Star Chamber, which decided that marriage, though no longer a sacrament, retained all the incidents of one, and therefore was not dissoluble; and so an injured husband or wife had no means

of getting relief from the marriage tie except by an appeal to the Legislature for a private act, — a remedy which, after 1798, under Lord Loughborough's orders, was not granted unless and until the petitioner had obtained a definitive sentence of separation *a mensa et thoro* from the ecclesiastical courts.

In 1809 a further order was made, that no divorce bill should be received without a clause prohibiting the offending parties from intermarrying. This clause, however, although insisted upon by the House of Lords, was regularly thrown out by the House of Commons; and there are only one or two cases where a bill containing such a provision became law, and in these the marriage, if it had taken place, would have been void by reason of the consanguinity of the parties. In 1857, an act establishing a court for divorce passed into law. It was strenuously opposed by Mr. Gladstone, who held — and holds — the extreme High Church view as to the indissolubility of the marriage bond, and whose views on the subject will be found stated at length and expounded with all his unequaled ability in his "Gleanings from Past Years." The jurisdiction of the Divorce Court has remained practically unchanged from 1857 to the present day. It will be found stated below when we come to sum up the jurisdiction of the Probate, Divorce and Admiralty Division.

The High Court of Admiralty dates as far back as the time of the Plantagenets. Its jurisdiction was both criminal and civil. The criminal jurisdiction comprised crimes committed on the high seas. But this has now been transferred to the Central Criminal Court (the Old Bailey) or the judges of assize, according to circumstances. The civil jurisdiction embraced suits for the purpose of enforcing bottomry or respondentia bonds, salvage actions, actions to enforce the payment of money due for necessaries supplied to a ship, or for wages due to the master or crew, or for pilotage services; actions to recover damages in cases of collision and of damage done by any ship; cases of damage to goods, or in respect of breaches of contract where the owners of the vessel were domiciled abroad; and questions of prize and booty of war, — a jurisdiction, by the way, exercised by virtue of a special warrant. Appeals lay from the High Court of Admiralty to the Judicial Committee of the Privy Council.

The three tribunals to which we have been referring have now been consolidated in the Probate, Divorce and Admiralty Division of the High Court of Justice. The Judicature Act of 1873 assigned to this division, (1) all causes and matters pending in the Court of Probate or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty; (2) all causes and matters which would have been within the exclusive cognizance of these courts if the Judicature Act had not passed.

The non-contentious and contentious business of the Court of Probate and the jurisdiction of the High Court of Admiralty have been already referred to. It may be interesting, however, to analyze the English law as to divorce somewhat more closely. A husband is entitled to a divorce from his wife on the ground of her adultery alone. A wife is not entitled to a divorce from her husband on account of his adultery unless it is (*a*) incestuous, i. e. committed with a woman whom he could not marry though his wife were dead, by reason of her being within the prohibited degrees of consanguinity or affinity; or (*b*) bigamous, i. e. committed with the same woman whom he has bigamously married (Horne *v.* Horne, 27 L. J. M. 50); or (*c*) coupled with cruelty or desertion without reasonable cause for two years or upwards. A wife is also enabled to obtain divorce on proof that her husband has committed rape or an unnatural offense. There are, however, certain bars to a decree for dissolution of marriage. Some of these are absolute; others are discretionary. The absolute bars are active or passive connivance by the petitioner at

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the guilt of the respondent — condonation is a voluntary and unconditional forgiveness of the offense charged, with full knowledge of the facts, and followed by cohabitation — and collusion between the petitioner and the respondent. The discretionary bars are the petitioner's adultery, unreasonable delay in presenting or prosecuting the petition, the petitioner's cruelty, unreasonable and willful desertion of the respondent by the petitioner before the offense charged, and willful misconduct or neglect on the part of the petitioner, conducing to the conduct complained of. The effects of a decree for dissolution of marriage are these: (1) the wife is entitled to alimony *pendente lite*, whether she is petitioner or respondent, unless the Court is of opinion that she has independent means of support, or it seems desirable on other grounds that her application should be refused (Phillips *v.* Phillips, 13 P. D. 220). Alimony *pendente lite* ceases, however, on decree *nisi* if the suit is tried before a judge alone, or if tried before a jury on a verdict finding her guilty (Dunn *v.* Dunn, 13 P. D. 19). (2) Under Sec. 32 of the Divorce Act of 1857, amended by Sec. 1 of 29 and 30 Vict., ch. 32, the Court *may*, on pronouncing any decree for a dissolution of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife, by a deed prepared and approved by one of the counsel of the Court of Chancery, such gross or annual sum of money as to the Court may seem reasonable, or order that the husband shall make certain monthly or weekly payments to the wife for her maintenance and support during their joint lives. In the latter case, if the husband shall from any cause be unable to make such monthly or weekly payments the Court may discharge, modify or temporarily suspend the order, with power to revive the same in whole or in part. (3) After a decree for divorce, the Court may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and vary the settlements for the benefit of the children of the marriage, or either of them, though there are no children. (4) After, but not before, the decree absolute (six months after the decree *nisi*) for divorce, either of the divorced parties may marry again. (5) The Court has a discretionary power to deal with the custody of the children of divorced persons.

A petitioner failing to make out a case entitling him or her to a dissolution of marriage may, if the Court think fit, obtain a decree of judicial separation. The ordinary grounds of such a decree are adultery (in the case of a wife), desertion and legal cruelty. Legal cruelty has been recently defined, in the Countess of Russell's case, by the Court of Appeal. The Court held (Lord Justice Rigby dissenting) that to constitute legal cruelty there must be a reasonable apprehension of danger present or proximate, to life, limb or health.

The magistrates' law as to matrimonial causes is contained in the Summary Jurisdiction (Married Women) Act, 1895, and requires very careful study. It is a consolidation with material amendments, of section 4 of the Matrimonial Causes Act, 1878 and 1886, and shortly put, enables married women ill-treated by their husbands to obtain from justices all relief, short of divorce, which they could reasonably expect. The Act of 1878 empowers any court convicting a husband of an aggravated assault upon his wife, if satisfied that the future safety of the wife is in peril, to order (1) that the wife be no longer bound to cohabit, (2) that the husband make to the wife a weekly allowance of an amount practically limited only by the discretion of the Court; and (3) that the custody of any children under ten be given to the wife. The act of 1886 empowers any married woman deserted by her husband to obtain from justices of the peace, if satisfied that the husband can but will not maintain her, an order that the husband pay her such weekly sum, not exceeding 2*l.*,

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as they may consider to be in accordance with his means and hers. The new act, which does not come into operation until January 1 next, imposes the *2l.* limit on the weekly allowance in all cases, but is otherwise more indulgent to the wife. There is jurisdiction given to justices to make the separation order not only in case of aggravated assault, but in case of "persistent cruelty" causing the wife to leave and live separately and apart from the husband; and the age at which the custody of children may be given to the wife is to be raised from ten to sixteen. The adulterous wife is to be *prima facie* barred of her relief as before; but the proviso that the bar is to be removed if the husband has condoned, *or connived at, or by his willful neglect or misconduct conduced to* the adultery, is new as to the words which we have italicized. There is an entirely new enactment, to the effect that justices, if of opinion that the matters in question between the parties or any of them may be more conveniently dealt with by the High Court, may refuse to make an order under the act; but it is added that the High Court may in such a case direct a rehearing.

To this summary of the practice of the Divorce Court, it scarcely needs to be added that a marriage is void if contrary to statute or common law, and voidable on the ground of impotency, undue influence or duress.

The Probate, Divorce and Admiralty Division consists of a president and a puisne judge. The former office is just now occupied by Sir Francis Jeune; the latter by Mr. Justice Gorell Barnes. Lord Justice Lopes has repeatedly sat in the Probate Division for the trial of probate and divorce causes; and during the recent illness of Mr. Justice Barnes, Mr. Justice Janisford Bruce, one of the judges of the Queen's Bench Division and a distinguished admiralty lawyer, took his place for the trial of admiralty actions. Of Lord Penzance and Lord Hannen we have already spoken.

SIR CRESSWELL CRESSWELL.

Sir Cresswell Cresswell was the first judge ordinary of the Divorce Court. His father was a sea-captain in Northumberlandshire and it was in connection with maritime topics that he made his earliest work at the bar. Like most other barristers, he had to wait for work — seven years without a single brief was his professional purgatory — but unlike many barristers, he put his time to profitable account by collating with Barnewell, the Queen's Bench reports known as Barnewell & Cresswell, or B. & C. In 1834 he took silk and gained the leadership of the Northern Circuit, which he held till 1842, when, on the resignation of Mr. Justice Bosanquet, he was at once raised by Sir Robert Peel to the vacant judgeship in the Court of Common Pleas. In 1857 he was transferred to the Divorce Court, and transacted the objectionable business of that tribunal as competently as it could be done. His decisions will be found in Swabey & Tristam. He was knocked down by a couple of runaway horses on Constitution Hill, on July 11, 1863, and died a fortnight later from the shock.

THE RIGHT HON. STEPHEN LUSHINGTON.

The Right Hon. Stephen Lushington was made judge of the Consistory Court in 1828; judge of the High Court of Admiralty ten years later; and judge of the Court of Arches in 1858. He resigned in 1867, and died on the 19th of January, 1873. Among his principal judgments are Braithwaite *v.* Hook (8 Jur. N. S. 1186), as to the object of cathedral institutions; Williams *v.* Brown (1 Cart. 53), as to chapels of ease; Mr. Poole's case, where he sat as assessor with the Archbishop of Canterbury; Nevill *v.* Baker, where he held that a clergyman is punishable for refusing to perform divine service over the body of a member of a family deposited in a private vault, even though the member, being a married wo-

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man, had ceased to be a parishioner; and Burder *v.* Heath, the construction of the Articles of Religion (15 Moo. P. C.)

SIR ROBERT PHILLIMORE.

Sir Robert Phillimore was Queen's Advocate from 1862 to 1867. On August 1 in that year he became judge of the Court of Arches in the place of Dr. Lushington, whom three weeks later he also succeeded as a judge of the High Court of Admiralty. He sat as a judge of the Probate, Divorce and Admiralty Division from 1875 to 1883, when he resigned. He died in 1885. Sir Robert Phillimore was the author of the well-known treatises on international and ecclesiastical law which bear his name. A new edition of the latter has just been edited by his accomplished son, Sir Walter, who is destined to sit one day as judge of the Probate Division. Sir Robert Phillimore leaned to the High Church verge in the ritualistic prosecutions. His judgment in Martin *v.* Mackonochie (L. R. 2 A. & E.) is the most brilliant exposition extant of the historic character and continuity of the Church of England.

SIR CHARLES BRETT.

Sir Charles Brett acquired a knowledge of admiralty law possessed by few of his contemporaries in the course of practice, first at the consular bar at Constantinople and then in England. He succeeded Sir Robert Phillimore as a judge of the Probate, Divorce and Admiralty Division in 1883, and in 1891, on the promotion of Sir James Hannen to the House of Lords, he became president. He died soon afterwards, however, at Wiesbaden. He was a sound lawyer and a courteous judge, though lacking the dignity and firmness of his predecessor. One of his most interesting decisions was Scott *v.* Sebright (12 P. D. 21) — marriage under duress.

SIR FRANCIS JEUNE.

Sir Francis Jeune, who was made puisne judge of the Probate Division when Sir Charles Brett became president, and succeeded to the presidentship on the latter's death, is a son of the late Bishop of Peterborough, and one of the most distinguished ecclesiastical lawyers of this century. He was counsel for the Bishop of Lincoln before the Archbishop's court. As a judge he is painstaking and courteous, and supremely competent in admiralty work. In probate and divorce witness actions he is unsatisfactory, too apt to make up his mind prematurely, and too much inclined to take the examination of witnesses in his own hands, as if he were a French *juge d'instruction.*

SIR JOHN GORELL BARNES.

On the death of Sir Charles Brett, Sir Francis Jeune became president of the Probate Division, and the puisne judgeship which he vacated was given by the Lord Chancellor to Mr. John Gorell Barnes, Q. C. This was one of the best judicial appointments of modern times. The son of a Liverpool shipowner, Mr. Barnes had a large practice in mercantile cases, both on circuit and in town, and he has made an admirable judge. He was the first judge to introduce into the practical life of the courts "trial without pleadings." Soon after his elevation to the bench he broke down, owing, it is said, to the excessive work at the bar and to the high pressure at which he toiled, after he became a judge, in the early hours of the morning, to master the probate and divorce practice, with which he had been at the bar quite unfamiliar, and he was consequently absent from the bench for about eighteen months.

We have not dealt in these brief sketches with Lord Stowell. He was so truly an international character that the comity of nations almost forbids us to claim him as an Englishman. Moreover the facts of his life are as familiar to every educated man as those of Bacon.

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VIII. THE COUNTY COURTS.

THE modern County Court is the legitimate statutory descendant of the common law County Court which existed from Anglo-Saxon times down to the present century, and exercised both a contentious and a non-contentious jurisdiction of considerable range and importance. By the commencement of the 17th century, however, the ancient County Court had so fallen into disfavor that a need for the establishment of another court to take its place, in so far as petty litigations were concerned, had become widely felt. Accordingly in the third year of James I, a local Court of Request was created; other tribunals of the same character were created by local acts, and they rapidly became general throughout the kingdom. The Court of Request had power to entertain suits up to £15. But this jurisdiction was of far too limited a nature to satisfy the needs of the community, and accordingly in 1846 it was detertermined to revive in a new improved form the old common law County Court. Effect was given to this idea by the County Courts Act, 1846. The position and powers of the County Courts now depend on a statue passed by the legislature in 1888. There are at present 58 County Court circuits in England, exclusive of the city of London court, to which separate reference will be made. Each of these circuits is presided over by a judge, appointed, and removable, by the Lord Chancellor. The qualifications for the appointment is seven years' standing at the bar. In former days a County Court judgeship was looked upon as the appropriate reward of a Lord Chancellor's private secretary or a political "silk" who was not strong enough for the High Court Bench, or an elderly "junior" who had social influence with the occupant of the woolsack. But in recent years the position of matters has undergone a marked change. Occasionally indeed a barrister who has never had a brief in his life, and is but imperfectly familiar with the color of the tape with which it is tied, is pitchforked into one of these posts. But the modern County Court judge is very often a "silk" who would have been on the High Court Bench had an opportunity of promoting him to it occurred, and is nearly always an experienced and able lawyer. The salary attached to the office is £1500 a year, with an allowance varying according to circumstances for traveling expenses. In the case of illness or unavoidable absence from duty a County Court judge may appoint a deputy (being a barrister of not less than seven years' standing) to sit for him. The deputy's appointment is required to be intimated to the

SIR FRANCIS JEUNE.

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Lord Chancellor "forthwith," and he cannot act for more than a fortnight without the Chancellor's approval. The tariff for sitting as a deputy is three guineas a day. Attached to each of the County Courts on the circuits is a Registrar appointed by the judge with the Lord Chancellor's approval, removable by the Lord Chancellor, and remunerated partly by salary and partly by fees on the number of "plaints" entered in his court. The jurisdiction of the County Courts is very wide, and each parliamentary session adds to it. It embraces *inter alia* the following proceedings: (*a*) Questions between husband and wife as to the title to or possession of property. (*b*) The granting of probate or letters of adminstration where it appears that the deceased had at the time of his death his fixed place of abode in one of the districts specified in Schedule A to the Probate Act, 1857, that his personal estate was at the time of his death under the value of £200, and that he was not at the time seized or entitled beneficially of or to any real estate of the value of £300 or upwards. (*c*) Suits by creditors, legatees (whether specific, pecuniary or residuary), devisees (whether in trust or otherwise), heirs at law or next of kin in which the personal or real or personal and real estate against or for an account of administration of which the demand may be made shall not exceed in amount or value the sum of £500. (*d*) Suits for the execution of trusts in which the trust estate or fund does not exceed £500. (*e*) Suits for foreclosure or redemption or for enforcing any charge or lien where the mortgage charge or lien does not exceed £500. (*f*) Suits for specific performance or for the reforming, delivering up or canceling of any agreement for the sale, purchase or lease of any property where, in the case of a sale or purchase the purchase money, or in the case of a lease the value of the property, does not exceed £500. (*g*) Actions or matters relating to the maintenance or advancement of infants in which the property does not exceed £500. (*h*) Suits for the dissolution or winding up of any partnership of which the whole property, stock and credits do not exceed £500. (*i*) Proceedings to wind up companies where the amount of the capital paid up, or credited as paid up, does not exceed £10,000, and the registered office of the company is situate in the district of a County Court having jurisdiction under the Winding-up Act, 1890. (*j*) Generally, all personal actions where the debt demanded or damage claimed is not more than £50, or is reduced to not more than £50 by an admitted set-off; actions of ejectment where neither the rent nor the value exceeds £50; questions of title where neither rent nor value exceeds £50; other cases by consent or by remittance from the High Court—except, as above stated, a County Court judge cannot try actions of ejectment or actions in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market or franchise shall be in question, or for any libel or slander, or for seduction or breach of promise of marriage. In all actions where the amount claimed exceeds £5 — unless the action is of the nature of the causes or matters assigned to the Chancery Division — either party may demand, and in other cases the judge at his discretion may grant, trial by jury. The County Court jury consists of five. But this mode of trial is comparatively rare, and is in many circuits dying out, as the judges discourage it by putting their jury cases at the bottom of their lists. The appeal from the County Court is to a divisional court, or the High Court of justice. But there is, roughly speaking, no right of appeal except in cases where the claim exceeds £20, unless with the judge's leave.

At the present time all the County Court judges are on the same footing. But a proposal has recently been mooted that a premiership should be assigned, in point both of salary and of status, to one or more

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of the larger courts — which ought then to be made a possible avenue of promotion to the Bench of the High Court. There is a very great deal to be said for this proposal and its adoption may be, not improbably, the solution of the demand which is strongly urged by Liverpool and Manchester at present for the permanent localization of branches of the High Court in the larger provincial centers.

The City of London Court was originally expressly exempted from the provisions of the County Courts Act. It nearly corresponded to the old County Courts existing in other places, except that its jurisdiction in contentious matters was limited to real and mixed actions. It was practically converted into the County Court of London by the County Courts Act, 1867. The judge of the City of London Court is elected by the City of London. He has a considerably larger salary than that of an ordinary County Court judge. The present judge is Mr. Commissioner Kerr, of whom more anon. There is also a deputy judge, Mr. Julian Robbins.

The practical work of a County Court judge is multifarious and heavy. One main part of it consists in judgment, summonses under the Debtor's Act, 1869, in which a judgment creditor applies for an order committing a defaulting debtor to prison unless he pays his debt on such terms and within such times as the judge prescribes. The procedure in these cases is extremely informal. The creditor or his agent is sworn. The judge then questions him as to the debtor's means, whether he is married or single, and in the former case as to the number or ages of his children if (any). Very often the debtor does not appear. Sometimes he does, or his wife or daughters appear for him, and, a few questions of a similar character enables the judge to make his order — for so many days' imprisonment unless the debt is paid within a certain period or in certain installments. Very few of these debtors go to prison, and it is not an infrequent occurrence for the bailiff, when he comes to effect an arrest, to be met by the query, "Ow much?" followed by a prompt settlement of the debt. After judgment summonses come the ordinary common law actions — breach of warranty, goods sold and delivered, running down cases, and so on. Occasionally really difficult points of law arise, in which the judge either gives at once, or reserves, his decision as he thinks fit. Barristers practice regularly in the County Courts. Solicitors also have a right of audience, and very frequently conduct their own cases.

HIS HONOR JUDGE[1] BACON.

His Honor Judge Bacon, the County Court judge, of Bloomsbury, is one of the ablest and most popular of his colleagues. The son of the last of the Vice-Chancellors, Sir James Bacon, who died in 1895, he was born in 1632, and after a successful career at Oxford (he graduated as M.A. at Balliol College), he was admitted to the Society of Lincoln's Inn. Bacon was called to the Bar in 1856, and joined the Eastern circuit, where he practiced principally as a draughtsman and conveyancer. In 1868 he became private secretary to Lord Gifford. Two years later he assumed a similar office in relation to his father Sir James Bacon — then raised to the Vice-Chancellorship. In 1878 he was made a County Court judge. Judge Bacon is an admirable lawyer, a keen analyst of character, a patient, though not too patient, listener, and a charming host and friend in private life.

HIS HONOR EX-JUDGE HOLROYD.

Henry Holroyd, late judge of the Southwark and Wandsworth County Courts, was called to the Bar of the Middle Temple in

[1] By a royal warrant dated 8th August, 1884, a County Court judge is entitled to be described as "His Honor Judge——" and to take rank and precedence next after knights bachelor.

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1853, and joined the Oxford Circuit. He never secured a large practice, and owed his promotion to the County Court Bench, to the repute which he acquired as a law reporter to the Incorporated Council of Law Reports from its commencement in 1865 up to 1870. He was raised to the County Court Bench in 1880. "Mr. Holroyd's reports," says a judicious biographer, "had many characteristics peculiarly his own. They avoided mere verbiage; they were free to a degree from ambiguity; they were perspicuous; his citation of cases invariably exact, and above all his legal propositions were sound; they were never encumbered with needless material, while his diction was always polished and refined.

Judge Holroyd was on the bench a model of patience and courtesy. His decisions were seldom appealed against, and when they were so, were almost invariably upheld. He was not, however, either a strong or a successful judge in his treatment of juries and they frequently took the bit in their teeth and returned verdicts contrary to the whole tenor of the charges.

HIS HONOR JUDGE LUMLEY SMITH.

Judge Lumley Smith, the County Court judge of Westminster, is one of the many English lawyers who have missed the Bench of the High Court by accident. He was called to the Bar of the Inner Temple in 1860, and soon acquired a large practice both at the South Eastern Circuit and in town. He was made a Queen's Counsel in 1880, and also became Recorder of Sandwich, one of the Cinque Ports. As a lawyer he was in the foremost rank of his contemporaries, and his elevation to the Bench was regarded as morally certain. But again and again other men with stronger political though inferior legal claims, were passed over his head, and ultimately he accepted the County Court judgeship of Westminster when it was vacated by the death of Judge Bagley, who administered justice there until he was a nonagenarian. If, as seems probable, county court judges are ere long occasionally transferred to the High Court Bench, Judge Lumley Smith will be among the first to secure promotion.

HIS HONOR JUDGE MEADOWS WHITE.

Judge Meadows White belongs to the same category. He was called to the Bar of the Inner Temple in 1853, practiced like Judge Lumley Smith on the South Eastern Circuit, was made Recorder of Canterbury, took silk in 1877, and stood at the very threshold of the High Court Bench till 1894, when he succeeded Judge Eddis as County Court judge of Clerkenwell. Unlike Judge Lumley Smith, he is too old a man to reach the High Court.

HIS HONOR JUDGE FRENCH.

Judge French is a third type of the same class. He was called to the Bar of the Inner Temple in 1872, practiced on the old Northern Circuit, took silk in 1885, was again and again mentioned for a Queen's Bench judgeship, and at last became County Court judge of Middlesex. Probably, however, his promotion may only have been postponed. Before his appointment he was frequently engaged as counsel in the series of important recent cases as to the service of writs out of the jurisdiction.

HIS HONOR JUDGE HUGHES.

Judge Hughes has a world-wide reputation as the author of "Tom Brown's Schooldays" and "Tom Brown at Oxford." He was, besides this, a sound equity lawyer (not in large practice however) and a keen Radical politician. These three qualifications combined to secure him the County Court judgeship of Cheshire.

HIS HONOR JUDGE ADDISON.

Judge Addison is not the author of Addison on Contracts or on Torts. He was

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called to the Bar of the Middle Temple in 1862, practiced on the Northern circuit, prosecuted Mrs. Maybrick ably, and in spite of the advocacy of Lord, then Sir Charles Russell, successfully. This case has, as every one knows, excited great controversy. It is clear that at the time when he tried the case, Sir James Fitzjames Stephen was in very indifferent mental health, and he certainly dwelt too strongly on the moral aspects of Mrs. Maybrick's conduct. Moreover, the experts for the prosecution were not clear as to the cause of death being arsenical poisoning. It is not impossible that the inquiry may be reopened. Judge Addison has lately been appointed County Court judge of Newcastle on the death of Mr. Digby Seymour, Q.C.

HIS HONOR JUDGE HOLROYD.

MR. COMMISSIONER KERR.

Mr. Commissioner Kerr is the judge of the City of London Court, to which reference has been already made. He is of West of Scotland extraction, and is a member of both the Scotch and the English Bars. He made one or two unsuccessful efforts to get into Parliament, and was ultimately raised to the Bench. City men and lawyers alike have a very high opinion of Commissioner Kerr's administrative powers. He is a sound and — naturally — an experienced lawyer, a prodigious worker, and the very embodiment of common sense. He has on more than one occasion come into conflict with the judge of the High Court, on appeals from his decisions, because of the extraordinary scantiness of his "notes." Probably however if the High Court judges had to try as many cases in a day as Mr. Commissioner Kerr, their notes too would be distinguished by the conspicuousness of absence. Recently Mr. Commissioner Kerr has been provided with a short-hand writer to take notes for him. He has now also secured a deputy, Mr. Julian Robbins, to relieve his lists. He has a salary of over £3000 a year. Although abrupt in manner and somewhat hot-tempered, he makes an excellent judge, and is an exceedingly kindhearted-man. When his long-talked-of retirement takes effect, civic and legal life in England will be the poorer by his withdrawal from it.

HIS HONOR JUDGE CHALMERS.

Judge Chalmers was at one time a stipendiary magistrate in India. He subsequently practiced with success at the English bar, and was at an unusually early age raised to the County Court judgeship of Birmingham. He is one of the very ablest judges on the Bench. Moreover, he is a jurist as well as a judge. The Bills of Exchange Act, 1882, and the Sale of Goods Act, 1893, were drafted by him, and he is taking an active part in the work at the Society of Comparative Legislation. American lawyers are probably familiar with his contributions to the "Law Quarterly Review." A year or two ago Judge Chalmers ex-

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changed offices for a few months with Sir Reginald Hancock, the Chief Justice of Gibraltar. He has sat as a Commissioner of Assize, and it was regarded as an open secret that Lord Chancellor Herschell would have raised him to the Bench of the High Court if a suitable opportunity of doing so had occurred.

Among the other notabilities of the County Court Bench may be mentioned the late judge Stephen, author of Stephen's Commentaries, a work reputed to yield an income (seldom to be derived from a law treatise) of about £600 a year! Judge Ellicott of Gloucester, son of the late Bishop Ellicott — an appointment which provoked very adverse criticism upon Lord Halsbury, as Mr. Ellicott had no practice or professional experience worthy of the name, but which has turned out well; Judge Selfe, a *quondam* secretary to Lord Chancellor Cairns; ex-Judge Brynmor Jones, appointed to a Welsh circuit when he was only about thirty-eight years of age; and Judge Emden, some time a Registrar in Bankruptcy.

LEX.

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THE COURTS AT BAR.

FOR the first time in the history of the country the Federal Courts have been arraigned at the bar of public opinion, charged with — not high crimes — but misdemeanors. The majority of a party convention of delegates from every State in this Union has, with severe language, attempted to rebuke not only the Supreme Court at Washington, but Federal Courts of States, for alleged usurpations and for capricious decision while declaring against the life tenure which the Fathers of the Constitution embodied among its provisions. Another party comes forward to object to such, or to any, arraignment in the political forum of the Judiciary. Upon two previous public occasions the decisions of the Supreme Court upon a public question have been questioned and indeed passionately attacked. Notably so when, a little more than thirty-six years ago, a party, by resolutions and oratory, inveighed against what was popularly known as the Dred Scott decision, which was penned by the Chief Justice and endorsed by other learned judges, and the language, as is now universally agreed, distorted for political advantage. A decade later public sentiment divided in criticism upon what was known as the legal tender decision, wherein the Supreme Court equally divided in opinion, with the remarkable result of a Chief Justice, true to his legal convictions, declaring unconstitutional a statutory provision which, in a former administrative official position, he had himself formulated and recommended its enactment. Public feeling rose high when the equal division was broken and a decision reached only by the creation of two new justices whose votes turned the scale. Party feeling charged that these additional judges had been, previous to their selection, polled on the question important to the government by the appointing power, although no evidence to support the charge was ever adduced, and it rested then as since upon mere surmise. Not long afterwards judges of the Supreme Court, acting as a commission to decide a presidential election, decided it by a majority of one, with every judge voting in accordance with his previous political opinions on a quasi political question. Again public feeling and severe criticism more or less severely assailed the Court and drew forth warm defenses. Nearly two decades later the Court again divided upon a heated public and political question as to the constitutionality of an income tax, and once more a final decision prevailed by a majority of one, produced by one of the judges upon reargument, changing his previous views and, as none doubted nor insinuated to the contrary, from honest convictions and under sober second thought.

These various debatable results, and especially that upon the income tax, appear to have impressed some portions of the people with suspicion, and perhaps prejudiced inquiry. And at length the dubitantur of a portion of the populace brought the Supreme Court into the political arena. It is a significant incident that on the argument in favor of the constitutionality of the income tax, counsel James C. Carter, an eminent member of the New York Bar, boldly, and, as some have dared to intimate, in the nature of a respectfully conceived and respectfully uttered menace, asserted that if the Court decided against his client the time might arrive when an angry portion of the populace would, like another Coxey army, march upon Washington for a reckoning with the judges. The pending question, for the first time in the history of the Republic, arrayed masses against classes, and the poor against the rich.

About the same period, Federal Circuit and District Courts, for the first time, pushed the procedure of injunction beyond matters

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of personal rights, and contentions about property into questions of social and political gravity; and unfortunately affecting again topics which ranged masses against classes. A new popular upheaval came when Federal judges undertook to assert the dignity of their courts by the familiar inherent and necessary power of summary proceedings for contempt. For, said many popular leaders, it is monstrous that, while allowing a contempt of court to be a criminal offense, instead of invoking the aid of Grand and Petit Jury, a judge should unite in his own person, like the Pooh Bah in the comic opera of the Mikado, several distinct functions, and pose as complainant, as jury, and as punisher by imprisonment. Shrewd politicians took up the cry, and from many hustings came the plea that not only the Supreme Court favored millionaires and corporations by overturning the income tax which favored the poor, but that other Federal Courts oppressed the laborer by summary injunction. Unhappily for judicial traditions and suitor comity the ermine became dragged in the political mire. No Coxey army, however, marched to Washington to reckon with the judges, as counsellor Carter had suggested, but Coxey himself and some partisan comrades marched to a Western city and there, in regular convention, fashioned this plank of a party platform: —

"We declare that it is the duty of Congress to use all the constitutional power which remains, after that decision (against the income tax), or which may come from its reversal by the court, as it may hereafter be constituted, so that the burdens of taxation may be equally and impartially laid, to the end that we may all bear our proportion of the expenses of Government."

Naturally it is criticised sharply by an opposite party, yet, oddly enough, by the very party which originated political criticism of the same tribunal under an earlier judicial composition. In 1860 the National platform declared the new dogma, that the Constitution of its own force carries slavery into any or all of the Territories of the United States, is a dangerous political heresy, . . . is revolutionary in its tendency and subversive of the peace and harmony of the country. . . . We deny the authority of Congress, of a Territorial Legislature, or of any individuals (meaning judges of the Supreme Court), to give legal existence to slavery in any Territory of the United States. As is historically known, these sentences were drafted by delegate William M. Evarts, who, with profound respect, as his whole legal career shows, for courts, preferred to use the euphemistic phrase "any individuals" to the word "judges."

These glances at history show, without any necessity of outlining views or taking positions respecting the quoted plank of the political platform that summons the Supreme Court into the political arena, in what way the summons has come about.

Another political party is, by its tenets, demanding that the judges of the Supreme Court shall, by amendment of the Constitution, change the present mode of their selection into such a popular election by the voters of the entire Union as it also demands for direct choice of President and Vice-President without the machinery of electoral colleges. In a way there were in the Federal Constitutional Convention a few who might be termed, after a phrase of to-day, Populists, who were willing to trust the people with all functions of selecting officials much after the early spirit of the New England town meeting; as reference to the debates — unfortunately raggedly reported — seem to show. But the arguments of the large majority in that Convention which adopted the present system of choosing judges with life tenure, together with the essays in that classic volume, the Federalist, and the views of Joseph Story in his Commentaries on the Constitution, remain for consultation and are seemingly as strong to-day as they all were when written. But

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changing the Constitution is a tedious and difficult process, and the people of this country seem yearly to more and more respect the old maxim, *stare super antiquas vias*. And that maxim will doubtless play a potent part when the planks touching court and judges come under discussion.

But to recur a moment in conclusion at these glances at judicial history, there was much — and with some reading between the lines — in the dissenting opinions on the income tax to encourage one class of politicians to exalt the rights of masses against classes. For instance, dissenting Justice Harlan observed: —

"The practical effect of the decision today is to give to certain kinds of property a position of favoritism and advantage inconsistent with the fundamental principles of our social organization, and to invest them with power and influence that may be perilous to that portion of the American people upon whom rests the larger part of the burdens of the Government, and who ought not to be subjected to the dominion of aggregated wealth any more than the property of the country should be at the mercy of the lawless."

And dissenting Justice Brown added in yet more strong terms — that might be almost termed Populistic as we know the word, not in a partisan, but a purely etymological sense: —

"As it implies a declaration that every income tax must be laid according to the rule of apportionment, the decision involves nothing less than a surrender of the taxing power to the moneyed class. . . . I hope it may not prove the first step toward the submergence of the liberties of the people in a sordid despotism of wealth. As I cannot escape the conviction that the decision of the Court in this great case is fraught with immeasurable danger to the future of the country, and that it approaches the proportions of a national calamity, I feel it my duty to enter my protest against it."

If the decision "approached the proportion of a national calamity" there would seem to be at least a small excuse for a party to pass resolutions touching the "national calamity." And either Justice Harlan or Brown, in conning the clause first quoted in this article, may in their eminent classic recollections recall this verse of the poet Waller of the seventeenth century: —

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

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LONDON LEGAL LETTER.

LONDON, August 1, 1896.

HERE in this important commercial center a great majority of the disputes on trade and business matters are settled out of court, either by committees of trade and commercial organizations or by arbitration. The tedious delay that follows the filing of a suit, and the large and almost ominous expenses connected with the ordinary course of litigation are the deterring influences which are keeping the best class of litigants away from the portal of justice. Not only have the lawyers recognized this condition of affairs, but for some years past the judges have been considering what relief could be afforded. A little over a year ago Mr. Justice Matthew took the matter up, and proposed to his associates on the bench the establishment of a commercial division of the High Court. Mr. Justice Matthew had had a large commercial practice before he was called directly from the junior bar to the bench. His action on the bench was characterized from the first by resolute determination and a scarcely veiled contempt for technicalities of pleading and practice. He delights in facts, and his constant exclamation is, "Yes, yes, Mr. Silk, that may be so, but what are the facts? Give me the facts!" Having once acquired these, his decisions are quick and deep-cutting, and invariably just.

The judges fell in with his suggestion, and under the power conferred upon them by the Judicature Acts they gave him authority to formulate the rules for the new court, or more properly for a new division of the Court. These rules define commercial causes to include causes arising out of the ordinary transactions of merchants and traders, amongst others those relating to the construction of mercantile documents, export or import of merchandise, afreightment, insurance, banking and mercantile agency and mercantile usages. An action with respect to any of these matters is brought in the usual way, and then after the parties have appeared, and, in some cases, before the defendant has appeared, application may be made to Mr. Justice Matthew, who sits in Chambers every Saturday morning to hear such applications, to have the cause transferred to the commercial list. All that need be shown in support of the application is that the case is really a commercial case. The Court of Appeals, in an appeal from the decision of a chancery judge who had refused leave to have a cause transferred from his court to the commercial list, stated that the object of the establishment of the Commercial Court was not that, on the one hand, all commercial causes, or on the other hand only short causes, should be tried there, but that causes should be so tried "which are likely to be more speedily, economically and satisfactorily tried if brought before a judge having special familiarity with mercantile transactions." The appeal was therefore granted, and the cause, which involved a number of complex transactions between merchants in London and Calcutta, and an application for an accounting, was transferred from the Chancery side to the Commercial Court.

Once the case is lodged in this Court the practice is of the simplest kind. The judge directs that there shall be no pleadings, but that "points" shall be exchanged within a limited period, usually about ten days; that a list of documents or other matters to be put in evidence shall also be exchanged, and that the case shall be heard at the first open date on his calendar, after these exchanges have been made. Everything which tends to complicate or delay the issue is discouraged. Applications for inspection of documents, for the delivery of interrogatories and other interlocutory applications which are generally so numerous, are quickly settled, and with the idea of getting straight away at the hearing of the case and to promote its speedy determination.

How well the system works is manifest from the following illustration. A firm in New York recently sent to England an agent to sell in Great Britain a patented article of great commercial value. The agent had hardly entered upon his work when he was served with a writ and a notice of an application for an injunction to restrain him from selling or soliciting orders for his goods. His appearance was entered, and with it an application to have the cause transferred to the Commercial Court, on the ground that as the plaintiff claimed to have exclusive license to this territory under a contract with the defendant's employers, the question in the case was one of construction of a contract. The motion was granted, and an immediate day fixed for the hearing of the application for the injunction. This however was postponed until the case should be heard on its merits, six weeks afterwards, that being the first vacant date. Counsel waived the exchange of points, but gave lists of documents and letters to be used at the trial. When the case was heard no witnesses were called, no evidence was formally put in and no documents were proved. Counsel, however, at the instance of the Court, argued and commented upon the evidence contained in the letters and documents as freely as if they had been technically proved. The matter involved a business whose transactions covered a period of seven years, and whose annual profits were more than $50,000. Had it been conducted in the ordinary way the trial would have lasted a week, and it would have involved a large expense in taking testimony to prove the documents. Under the new system the trial was compressed within less than two days, and from the time the writ issued until final judgment was rendered was not more than eight weeks.

This expedition in business and the cheapness with which it is connected have already attracted the attention of business men. New cases are coming to the courts, and the tide of litigation, after having been at a low ebb for years, is beginning to flow. What has been accomplished here may, perhaps, be done in the United States, but there are two circumstances at work here which give the experiment a greater assurance of success than could be expected in your country. In the first place the Bar in England holds the judiciary in the greatest respect — perhaps "awe" would be a better expression. Whatever the judgment of a judge or his conduct of a case, no remonstrance is heard, no exception is taken to a ruling, and no opposition of any kind is manifested. In the next place, when finally the cause is determined and a verdict is rendered or a judgment delivered, that is, in the great majority of instances, the absolute end of the matter. Appeals are rarely taken, and, when taken, rarely result in a reversal of the finding of the court below.

STUFF GOWN.

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The Lawyer's Easy Chair.

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

.·. .·. .·. .·. .·. BY IRVING BROWNE. .·. .·. .·. .·. .·.

CURRENT TOPICS.

THE SHORT LOBSTERS CASE.

(State *v.* Swett, 87 Me. 99.)

"Look not upon the lobster when 'tis red,
Unless ten inches and a half in length";
'Tis thus the solemn law of Maine has said,
In order to preserve its numerous strength.

"Each lobster must be laid upon its back,
And accurately measured without fail,
From bone of nose unto the tiny crack
At end of middle flipper of its tail.

"If shorter are in one's possession found,
Our sheriff then shall seize him by the collar,
And hold him straitly liable and bound
Until he pays the State for each a dollar."

A totally depraved expressman took
Two thousand, packed in barrels, not so long,
To carry to their purchasers by book,
Incited by the devil to this wrong.

Although he didn't know the fish were short,
Yet in the haste of business did not pause
To ascertain; the officers of court
Claimed that he fell within the Statute's clause.

But said the Court, "The carrier had no power
Nor time to measure all those lobsters' backs;
He held them but a quarter of an hour;
For his small freight 'twould be too great a tax."

The State was thus too early or too late:
It should have nabbed the fishers at the beach,
Or caught consumers with them on the plate;
For carriers are beyond the legal reach.

The statement in the book does not disclose —
(And the omission seems extremely odd)—
Another good defense, for I suppose
The barrels all were marked "C. O. D.," cod.

BALZAC ON LAWYERS. — The Easy Chairman is amusing his summer leisure by reading the novels and stories of Balzac — prodigious genius! comparable only to Dickens. He has plenty to say about law and lawyers. Let us commend to our brothers the perusal of "The Commission in Lunacy" and "Colonel Chabert." In the latter the great author says: "There are in modern society three men who can never think well of the world — the priest, the doctor and the man of law! And they wear black robes, perhaps because they are in mourning with every virtue and every illusion. The most hapless of the three is the lawyer. When a man comes in search of the priest, he is prompted by repentance, by remorse, by beliefs which make him interesting, which elevate him and comfort the soul of the intercessor whose task will bring him a sort of gladness; he purifies, repairs, and reconciles. But we lawyers, we see the same evil feelings repeated again and again; nothing can correct them; our offices are sewers which can never be cleaned."

A RELAPSE. — The Easy Chairman has for years been preaching the doctrine of recumbency in vacation, and early last summer he discovered, to his great delight, some records of the laziest man who ever lived — Thomson, the poet of the "Castle of Indolence." It seems that he was too lazy to lie down when he found himself standing, and he used to stand, with his hands in his pockets, and nibble the peaches trained against the wall of his garden. Just after that discovery, the Easy Chairman's Eve offered him a bicycle. Poor man! too lazy to resist, he mounted the wheel and rode away, and now no more recumbency for him! He is as much a slave to the vice as the New York Court of Appeals judges used to be to their horses, on which they went cantering in sober procession from Albany to Saratoga to hold their summer court. The Easy Chairman has received professional promotion — he is now Master of the Rolls!

LEGAL HUMOR IN GEORGIA. — It is evident that there is in Georgia an aspirant to the place hitherto accorded to Chief-Justice Bleckley as a judicial humorist, in the person of Atkinson, J., who has succeeded to his seat. Some of our recent notes of cases from Georgia bear witness to this. So far however Atkinson, J., appears to be a judicial droll rather than a judicial humorist. For example, in Maine *v.* Conn. F. Ins. Co., 95 Ga. 613, the Court decide that a prohibition in a fire policy against keeping inflammable materials on the premises is of no avail where the materials are necessary to the prosecution of the business there carried on, and this was understood by the insurer. To hold otherwise,

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remarks Atkinson, J., would be in effect to say: "'I issue you this policy; I accept your money in satisfaction of my demand for premiums; I insure your property to be used in your business, but if you use it, your policy is void.' A parallel case, and one which alone adequately expresses the peculiar paradox in the case supposed, is one to be found in the sage advice given to her youthful daughter, when an affectionate but over-cautious mother, in reply to the simple request: —

> "'Mamma, may I go out to swim?'

said to her: —

> "'Yes, my darling daughter;
> Hang your clothes on a hickory limb,
> But don't go near the water.'"

Brought up, as we have been, in the Chief Justice's school, this does not seem to us anywhere near "parallel," nor even at an acute angle. The Chief, we think, would more probably have been reminded of the feast spread before Governor Sancho Panza, which, just as he was on the point of falling to, was swept away by command of his physician. We feel a fatherly interest in Atkinson, J., but he must study more before he can be regarded as anything higher than a promising amateur in judicial humor.

Lumpkin, J., is more truly humorous in Davis *v.* Dodson, 95, 721, where the Court held that a member of a legal partnership could not bind his partner by an agreement to charge nothing for the services of the firm in collecting a note owned by him and sold by him to a third person under that agreement. He observes: —

"We had thought it a very (*sic*) universally recognized fact that lawyers are in the habit of charging their clients for services, and that the main object of forming law partnerships was the avowed purpose of reaping a goodly harvest of fees. In fact, complaint has frequently been made that lawyers are sometimes too diligent and over zealous reapers. . . . We have yet to see the rare spectacle of an attorney-at-law, or a firm of them, rendering professional services gratuitously as a recognized and customary incident of the business in which they engage. We have (*sic*) long ago departed from the *honorarium* from which our ancient ancestors in this noble profession either wholly or partly derived their 'means of subsistence.'"

So the "inexorable partner, Jorkins" got his own. There are certain persons who have attained fame in the history of this country as "signers." Bleckley, C. J., will be known as the great *re*signer.

THE LIBRARY OF JULIUS CÆSAR. — It is noteworthy that great military commanders have frequently been fond of collecting books. Frederick the Great had libraries at Sans Souci, Potsdam and Berlin. Condé inherited a valuable library from his father, and enlarged and loved it. Marlborough had twenty-five books on vellum, all earlier than 1496. The hard-fighting Junot had a vellum library which was sold in London for fourteen hundred pounds. The great Napoleon began the printing of a camp library of three thousand volumes, in duodecimo, without margins and with thin covers, to be completed in six years by employing twenty-five editors and six hundred and twenty compositors, at an outlay of about one hundred and sixty-three thousand pounds. There seems to be no record of the original Julius Cæsar as a book collector, but Sir Julius Cæsar, Master of the Rolls under James I, was a bibliophile. He was Italian by birth, son of a physician named Adelmare, who settled in England and was medical adviser to Queens Mary and Elizabeth. The son was christened Julius Cæsar, and finally adopted that as his surname. The most interesting reminiscence of him is that he formed a traveling library of forty-four volumes, varying in size from four and three-quarters by two and a half inches to two and three-quarters by two inches, all bound in white vellum, and contained in an oak case, covered with ornamented leather and made to resemble a folio volume, and measuring sixteen inches long, eleven inches wide, and three inches deep. The books are arranged in three divisions — theology and philosophy, history, and poetry — are all in Latin and Greek, and were all printed between 1591 and 1619, at Leyden and Saumur. The inside of the lid is gracefully illuminated, and bears the arms of Sir Julius and of his second and third wives. This exquisite and unique library was acquired by the British Museum in 1842, and in Fletcher's recent work on "English Bookbindings in the British Museum," is an account of it, accompanied by three facsimiles of the exterior and interior in colors. There is also a picture of it in Mr. Roberts' recent "Book-Hunter in London." Another traveling library of which very little is known, was the door of Dickens' library, at Gad's Hill Place, which was adorned on the interior by counterfeit book-backs. The titles of some of them were very significant, as for example: "History of a Short Chancery Suit, 20 vols. and Index"; "Malthus' Nursery Songs"; "Socrates on Wedlock"; "Noah's Arkitecture, 2 vols."; "Lady Godiva on the Horse"; "Captain Cook's Life of Savage"; "The Wisdom of Our Ancestors. Vol. 1, Ignorance; 2, Superstition; 3, The Block; 4, The Stake; 5, The Rack; 6, Dirt; 7, Disease"; "Cats' Lives, 9 vols."

THE DECEASED WIFE'S SISTER. — A bill to abolish the law that a man shall not marry his deceased wife's sister, having been up in Parliament for the

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fiftieth time, has at last gone through the House of Lords and thus become a law. It has always prevailed in the House of Commons, but hitherto the priests of the sixteenth century, who infest the upper house and obstruct many kinds of advanced and necessary legislation, have rallied to defeat the measure, which is probably welcomed by nine-tenths of the people of England. As a sample of the arguments against it, reference need be made only to the contention that its passage would increase homicide, or rather uxoricide, on the part of husbands possessed by the temptation to marry their wives' sisters. A man who can raise that argument will argue anything, and there is no use in seriously answering him. In our humble judgment such marriages are the very fittest, especially where there are children by the first marriage. The civil prohibition of such marriages arose in a statute of the ultra-chaste reign of Henry VIII. The only ecclesiastical objection to such marriages is one that cannot be found in Scripture, but is read into it by the bishops in the most ingeniously absurd manner. In Leviticus, vi, 6, it is said: "None of you shall approach to any that is near of kin to him." The priests say this is a mistranslation; it should be, "flesh of his flesh." The Bible also says that husband and wife are "one flesh." Therefore the wife's sister is flesh of the husband! *Q. e. d.* It seems somewhat inconsistent with this argument that the Mosaic law should have enjoined it on the deceased husband's unmarried brothers to espouse his widow. But what is the use of arguing with bishops? Sentiment stands in the place of reason to them, and prejudice is their law. But at last they have been beaten by a majority of twenty-nine, and England no longer stands in the absurd attitude of holding incestuous and void a species of marriage which is respectable and valid in all her colonies. At an early day (1827), this ecclesiastical vagary seems to have been regarded as law in Virginia (Kelly *v.* Scott, 5 Gratt. 479), but in 1837, it was distinctly repudiated in Vermont (Blodget *v.* Brinsmaid, 9 Vt. 27), where the Court said: "Though a man is by affinity brother to his wife's sister, yet upon the death of his wife he may lawfully marry her sister." "The relationship by affinity ceases with the dissolution of the marriage which produced it." These seem to be the only cases in which this doctrine has received any notice in our courts

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NURSERY CONJECTURES. — In the present century of learned historical conjectures, some ingenious men have discovered history in nursery rhymes. In 1837 Mr. J. B. Ker published a book in two volumes entitled "The Archæology of Nursery Rhymes," in which he undertook to show that "by rendering the Nursery Rhymes of Old England into Dutch words having a resemblance in sound more or less far-fetched, strings of words could be obtained, which with a little arrangement were capable of being represented as a tirade against monarchism, sacerdotalism, catholicism." As Mr. Baring-Gould points out, in a recent attractive volume of "Nursery Songs and Rhymes," none of these Netherland renderings have survived in Holland, the most Protestant country in the world, and there is no explanation of the exportation to England. In 1862, Henry George published an attempt to show that "The House that Jack Built" is an historical allegory. For example, "the man all tattered and torn" represented the Protestant Church under Henry VIII, persecuted, tortured and despoiled. One has usually derived the impression that it was the Catholic church that then suffered. The kissing of "the maiden all forlorn" signifies Elizabeth's union of the churches. Not to be outdone, let us suggest that the game of "Simon Says Thumbs Up" is a survival of the Roman days, when the thumb turned up or down by the spectators at gladiatorial shows determined the fate of the conquered. The Roman nurses taught this to their infant charges!

NOTES OF CASES.

A SMALL BOY'S FLIGHT. — The small boy likes to fly high, when the flight is of his own seeking, but in Devine *v.* Brooklyn Heights R. Co., 1 App. Div. (N. Y.) 237, his flight was involuntary and his descent Icarian. The defendant was engaged in stringing cables upon iron poles in the street; several hundred feet of cable hung in loops from the cross-bars of the poles; a loop lay in the gutter for about thirty feet; the small boy, eight years old, endeavoring to cross the street, the cable was suddenly and without warning drawn taut by a team of horses at the end, caught him between the legs, tossed him up twenty or twenty-five feet, and in falling his skull was fractured and he was killed. The complaint was dismissed at the trial, but on appeal this was reversed. The defendant claimed that the cable was drawn taut slowly, but the Court on appeal cleverly answered this by saying that if so it would have been impossible that the lad should have been thrown up twenty feet into the air.

SLAVE LAW. — A curious memorial of the days of human slavery in this country is to be found in Flora, a Slave, *v.* State, 4 Porter (Ala.), 111, where it was held that on an indictment against a slave, it was essential that the name of his owner should be proved and found by the jury. This was because the statute required the jury to assess the value of the slave, and

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his owner was entitled to be reimbursed by the State to the extent of one-half of such assessed value!

It seems rather inconsistent with this doctrine that where a slave is convicted of a capital offense, his owner is liable for the fee for executing the sentence. State *v.* Jones, 2 Devereux (N. C.), 48.

But then again, where at the time of the sale of a negro slave on execution he had committed a murder, but had not been detected, and subsequently to the sale he was executed, held, that the purchaser who had paid the price was entitled to stand in place of the execution-creditor for the amount of the purchase money. Conner *v.* Gwyn, Haywood (N. C.), 121.

Parties who forcibly took from jail a slave charged with rape and murder, and hung him, were held liable to the owner for his value. Polk *v.* Fanchen, 1 Head (Tenn.), 336.

An overseer who ordered a slave to ride a horse in a race, whereby the slave was killed, was held liable for his value to the owner. Greer *v.* Emerson, 1 Overton (Tenn.), 13.

A landlord might take the negro slave of a third person found accidentally on the demised premises by distress. Bull *v.* Horlbeck, 1 Bay (S. C.), 301.

THE WIFE'S MOTHER-IN-LAW. — It is not often that the wife thinks she has "got even" with her mother-in-law, but she must think so in Williams *v.* Williams, 20 Colo. 51, or else she is a very unreasonable woman. This was an action for alienating her husband's affections and persuading him to desert her, and she had a verdict for $12,500, which was upheld on appeal. It would strike one that this is a high price for the affections thus alienated, but on looking into the case it appears that something more substantial than affections was alienated, namely, $25,000 in stocks and bonds, which the crafty mother-in-law raked in. The excuse the pusillanimous husband gave her was, "Ma has got all my money and will not give it to me until I do," and he told his wife he would return. The doctrine of this case is now the law of New York, Ohio, Connecticut, New Hampshire, Indiana, Michigan, Missouri, Nebraska, and Iowa; but is denied in Maine and Minnesota.

THE MORTGAGEE'S LIVE HAND. — An exceedingly interesting question is treated in a very learned and curious manner by Chief-Justice Bleckley in a Georgia case, Green *v.* Coast Line R. Co., 24 S. E. Rep. 814. The exact point of decision is thus stated: "Mortgages upon a railway, and the income from the same, the mortgagor being left in possession, are, as to the income, whether produced before or after the appointment of a receiver in foreclosure proceedings, subject to be postponed in equity in favor of a claim for damages resulting from a tort committed by the mortgagor while and by reason of operating the railway after the execution of the mortgage." The question is thus decided in opposition to the rule deduced from the authorities by Judge Thompson in his great treatise on Corporations, although he expresses no personal opinion on the point. The Court pay him a noteworthy compliment at the close of the opinion. The Court also say: "Every direct authority known to us is against us. Nevertheless, we are right, and these authorities are all wrong, as time and further judicial study of the subject will manifest. The mistake made by courts and judges has been that they treat the problem of preferential debts as having but one pole, — the affirmative pole of benefit, — ignoring the negative pole of burden altogether." There are many striking and effective analogies in the law of damages cited by the Court, but the most curious observation is the following: "Courts which thus reason and decide may possibly be reached by the late discovery of Prof. Roentgen, and, for their benefit and the benefit of the profession generally, we shall close this opinion with appropriate illustrations, based on the new process." This refers to a pair of cuts at the end, each representing "the hand of the mortgagee extended for *all*," and the "hand of the widow and ex-mother extended for *some*," first before and secondly after exposure to the Cathodic Ray. The first pair of hands are substantially similar, but the widow's hand in the latter group is only skin and bone and dark.

A CASE WITHOUT A NAME. — The value of nearly every member of the human body has been appraised in actions for damages, and now in Jackson *v.* Burnham, 20 Colo. 532, an action for malpractice in a case of phimosis, the value of an important member appertaining to the masculine part of the human race is appraised at $5000, which in most instances we should consider a reasonable valuation.

CHEAP DISORDERLY CONDUCT. — In State *v.* Sherrard, 117 N. C. 716, the defendant appealed from a fine of one penny for having noisily accused a person, in a restaurant, but only once, of being "a damned highway robber." The judgment was affirmed on the ground that it was disorderly conduct within a town ordinance, although not profanity within the general law. Sherrard was penny foolish in appealing, and probably swore more than once when he footed his own costs.

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The Green Bag.

PUBLISHED MONTHLY, AT $4.00 PER ANNUM. SINGLE NUMBERS, 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

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

THE GREEN BAG.

ASHEVILLE, N. C., August 6, 1896.

EDITOR OF THE GREEN BAG.

Dear Sir: In the August number of THE GREEN BAG you quote the poet Tom Moore in regard to that legal paradox, "the greater the truth, the greater the libel." Permit me to call your attention to a reference of Robert Burns to the same subject. It is as follows: —

"LINES ON STIRLING.

Written on a window in Wingate's Inn there.

Here Stuarts once in glory reigned,
And laws for Scotia's weel ordained;
But now unroofed their palace stands,
Their sceptre's swayed by foreign hands.
The Stuart's native race is gone!
A race outlandish fills their throne —
An idiot race, to honor lost:
Who know them best despise them most."

Burns, who was then a zealous Jacobite, being reproved by a friend for the above lines, replied, "I shall reprove myself"; and immediately wrote the following lines on the same pane: —

"THE REPROOF.

Rash mortal, and slanderous poet, thy name
Shall no longer appear in the records of fame;
Dost not know that old Mansfield, who writes like the Bible,
Says the more 'tis a truth, sir, the more 'tis a libel"?

Truly,
F. A. SONDLEY.

LEGAL ANTIQUITIES.

IN the preface to the Eighth Part of his Reports, Lord Coke says: "There are certain other cases now published by me, concerning some of the most abstruse, dark, and difficult points in the law, and yet very necessary to be known. And I have of purpose done these as plainly and clearly, and therewith as briefly, as I could. For the laws are not like to those things of nature, which shine much brighter through crystal or amber, than if they be beheld naked; nor like to pictures that ever delight most when they are garnished and adorned with fresh and lively colours, and are much set out and graced by artificial shadows."

FACETIAE.

GAOLER: "You will be released to-morrow. It is to be hoped I shall see you here again only as a better man."

PRISONER: "Do they imprison you also on that account?"

JUDGE (to the father, whose son stands at the bar, on account of repeated thefts): "You should have warned your son!"

FATHER: "I have done so. I have said to him repeatedly, 'Karl, be very cautious this time!'"

COL. POLK, who was much in request at the bar in the mountain district in N. C., was so detained by other business that he did not reach one of his courts till late in the week. On his arrival a suitor in an important case waited on him to obtain his services, and naively remarked: "I have retained old Maj. N—— in the case to *complicate* the matter till you could get here."

A SHORT time since a Mr. Knott was tried for a violation of the law. The verdict was: "We find the defendant Knott guilty."

The judge was at a loss whether to sentence him or not.

A MICHIGAN justice of the peace was about to fine an attorney for contempt of court, when the contumacious limb of the law arose and said he would plead the statute of limitations. "Statute of limitations!" exclaimed the justice, "what has that to do with the matter?" "Because, sir, I have entertained the utmost contempt for this court for considerably more than six years."

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COUNSEL for defendant was cross-examining the plaintiff.

COUNSEL: "Do you consider the oath that you have just taken to be binding on your conscience?"

PLAINTIFF: "I don't know vat you mean."

COUNSEL: "You know what 'conscience' is, don't you?"

PLAINTIFF: "No, sir."

Counsel for defendant concluded that the jury had been impressed and passed to other matters on his cross-examination. At the re-examination of the witness his counsel determined to efface the bad impression made on the jury by his client's ignorance of the meaning of "conscience." He proceeded as follows: —

"Now, Mr. —, you were asked what 'conscience' means; you know that, surely?"

"No, sir."

"Well, now, you know the difference between right and wrong?"

"Yes, sir."

"Well, then, you must know what conscience means."

"Vell, I don't know. I know vat *un*conscience means; dat's a kind 'o sickness."

JUDGE HUGH L. BOND, of the U. S. Circuit Court, for the Fourth Circuit, had a very prominent nose. He related the following incident of himself which he said was strictly and literally true. While judge of the Criminal Court of Baltimore, he had frequently to commit to jail for drunkenness, one Higginbotham, who was a fine performer on the trombone. On occasions of balls or dances the jailer, unknown to the judge, would turn him out, and "after the ball was over" he would return to jail. On one occasion, while he was serving one of these "tours of duty" in jail, there was a big masquerade ball in the city which Judge Bond and his wife attended in full mask. Promenading with her around the room, and passing near the music-stand he was surprised to to see Higginbotham there. Halting he said to him, "Why, Higginbotham, how is this? Are you here?" "Yes, I am here," giving a loud blast with his horn. "Why, I thought Judge Bond put you in jail the other day for thirty days." "Yes, he did, and the d—d old hook-nosed scoundrel thinks I am there now," giving another long blast with his horn. The Judge said, "My wife and I passed on without question or parley."

CHIEF-JUSTICE Charles P. Daly has many interesting anecdotes to tell of a witty member of the Bar named William Muloch. One of these relates to a repartee of the latter to a fellow lawyer. Another attorney passing in the City Hall, on his way to the court-room, was asked by the other as to his health. The one addressed was well-known for stupidity. He answered dolefully, "Ill. I have a headache, and my head is like an oven." "Aye," said Muloch to the other, "his head may be like an oven, but he'll never make much bread by it."

NOTES.

MARTIN GROVER, who for over a quarter century was a judge both of the Supreme Court and the Court of Appeals of New York State, wrote in the album of a lady resident in Albany, who was the wife of an eminent lawyer, the following maxims, which she says were written by him *currente calamo* and evidently from memory *or as impromptu.* "An ill man in office is a public calamity." "Be one ever so high the law is above him." "Good laws often proceed from bad manners." "He who puts on a public gown must put off the private person." "He that buys magistracy must sell justice." "It is often the clerk of the Justice who makes justice." "Laws catch flies, but often suffer hornets to go free." "A law maker should never become a law breaker." "While law governs man, it is reason that first governs the law." "The greater the man the greater the proven crime." "Wise and good men invented the laws, but the action of fools and the wicked put them up to it."

In the same album the late James T. Brady — who often wrote *vers de société* — had composed and also written the following versified maxims: —

Eadem ratio ibidem lex.

Whate'er should be, the law doth prove.
On paths of right the law doth move.

Falsus in uno, falsus in omnibus.

One whiff of falsehood taints a proof
That witness aims to make.
Both judge and jury hold aloof
When lying forms the stake.

Ratione cessante lex ipsa cessat.

Law's voice must instant cease
When Reason yields the ghost:
And Sophistry must hold her peace
When Logic leaves his post.

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Nemo repente turpissimus.

Not even Turpin Dick,
Highwayman brave and bold,
Could suddenly on trick
Or baseness take his hold.

Ex uno disce omnes.

As tallest oaks in forests grow
From smallest acorns dropped in mold,
So from one truth or falsehood flow
Currents of similars; for behold,
From one the whole you know.

De minimis lex non curatur.

From small and immaterial things
Law flies away on rapid wings.
Law values most Life's greater themes,
For smallest brooks feed widest streams.

Caveat actor vel emptor.

He who does and he who buys
Himself must heed that he be wise.

Accusare nemo se debet.

None shall be forced to criminate
Himself of charges small or great.

De non apparentibus non existentibus.

What don't appear, howe'er we twist,
But equals that which don't exist.

In New York City candidates for admission to the Bar must have either obtained a college degree or have passed a certificated examination before Regents of the State University (the body having more or less legislative wardship of all the colleges and academic schools). The applicants are next examined at an interlocutory session of the appellate court of the local district by three members of the Bar whom it appoints as interlocutors. Sometimes, however, there will be among the applicants those who would make better farriers than attorneys, and show stupidity. For instance, the examiner puts a question, "Can a wife after discovering the infidelity of her husband, but subsequently cohabiting, then bring action for divorce?" And the answer was: "Certainly, for his disbelief in a deity would be immaterial." Another, when asked "What action he would bring against a man who had warranted a horse sound when it had blind staggers," proceeded to stagger the listening judge with this answer: "Breach of promise, sir."

Per contra, often the examination evolves wit and repartee. To the query, "Give your views about libel," the answer began, "Every libel is a lie which, like the bell on a cow's neck, sounds far and wide, hence a belled lie or a lie-bel," but however ended by giving Alexander Hamilton's famous definition now used in all elementary treatises on Defamation.

Another applicant, when asked to define "law," responded: "Shall I give Coke's description or Blackstone's, or may I give my own?" Having been told to submit his own idea, he added: "I have been three years in the office of — (naming a celebrated legal firm), and have sedulously attended court proceedings and have come to the conclusion that law is injustice reduced to an exact science."

Probably the most frivolous, in quality, action for ejectment is pending in New York City, brought by a plaintiff against the Astor Estate, because of a top-story cornice overhanging his demesne two feet. "A corn-ice," exclaimed one of the lawyers, separating the dissyllable in two parts, with emphasis on the latter. "Why bring an action, when the best action would have been to break off the trespassing part under the saying *quare clausum freeze it?*"

Judge Martin Grover was a rare humorist, and his fun was accentuated by a curious twang of voice such as actors use when playing a Sam Slick part. On one occasion, while holding an Oyer and Terminer, in Niagara County, he was called upon to sentence a colored culprit, who, as is often the case with his race, enjoyed a high-sounding classic name — that of Plato. Referring to the offense and the convict's lame explanation of it, Judge Martin Grover began with, "Plato, thou didst not reason well, and I cannot give you a pleasing hope," etc. etc.

At another time, when in chambers, dismissing a frivolous and rather mean plea, filed for demurrer by an attorney named Smalley, Judge Grover remarked, "Judging from this plea of yours, I think you have been appropriately named."

At a Bar dinner in Philadelphia were two lawyers named Lee, but not related. They sat, as it happened, vis à vis, and Daniel Dougherty, the Irish wit of the Bar, who subsequently removed to New York and there won new forensic honors, called upon each for a speech, which having been given, he arose and proposed their health, saying, "Drink it, gentlemen, in Port wine, which is always best on its *lees*."

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BOOK NOTICES.

LAW.

The Duties and Liabilities of Trustees. Six lectures delivered in the Inner Temple during the Hilary Sittings, 1896, at the request of the Council of Legal Education. By Augustine Biorele, M.P., one of Her Majesty's Counsel. The Macmillan Co., New York, 1896. Cloth. $1.25.

In an exceedingly pleasant, and at the same time perfectly clear manner, Mr. Biorele sets forth the duties and liabilities of Trustees. A careful perusal of the 182 pages which make up this little volume will give one a better idea of the responsibilities and requirements pertaining to trusteeship, than many weary hours spent conning the voluminous legal treatises upon the subject. We commend the work especially to the younger members of the profession.

New Criminal Procedure, or New Commentaries on the Law of Pleading and Evidence and Practice in Criminal Cases. By Joel Prentiss Bishop, LL.D. Fourth edition, being a new work, based on former editions. Vol. II. Specific Offenses and Their Incidents. T. H. Flood & Co., Chicago, 1896. $6.00.

This volume completes Mr. Bishop's exhaustive treatise upon Criminal Procedure, and the work as a whole is entitled to the highest praise. It is equally helpful in States where there are codes of criminal procedure as in the other States. It gives the cases decided under the Codes, the same as the others. While it is indispensable to every practitioner in the Criminal Law, it explains the unwritten rules of pleading, and largely of evidence in things pertaining to the civil practice, in which the rules in civil cases are substantially the same as in criminal.

American Railroad and Corporation Reports. Vol. XII. E. B. Meyer & Co., Chicago, 1896. Law sheep. $4.50.

This series of Reports covers the current decisions of the courts of last resort in the United States, pertaining to the law of railroads and private and municipal corporations. It is of the greatest value to corporation lawyers, and officials of all companies and associations. The present volume contains a full index of vols. VII. to XII.

Hand-book on the Law of Damages. By William B. Hale, LL.B. West Publishing Co., St. Paul, Minn., 1896. Law sheep. $3.75.

Mr. Hale in this volume states with great clearness and accuracy the rules and principles governing the award of damages in civil cases. Law students will find the work of much assistance, while the practicing lawyer will do well to add it to his library as a valuable treatise upon this important subject.

MISCELLANEOUS.

Effie Hetherington. By Robert Buchanan. Roberts Brothers, Boston, 1896. Cloth. $1.50.

This is a story of remarkable dramatic power, and of the most absorbing interest. It is, however, one that a mother would hardly select for a daughter's reading. It is to be regretted that Mr. Buchanan has exhibited such a tendency towards the *risqué*, for his work is one of great literary merit. The devotion of the hero is truly noble, but the heroine, alas! is anything but a noble type of woman.

BOOKS RECEIVED.

A Treatise on the Law of Real Property as Applied Between Vendor and Purchaser in Modern Conveyancing, or Estates in Fee and their Transfer by Deed. By Leonard A. Jones, A.B., LL.B. Houghton, Mifflin & Co., Boston and New York, 1896. Two vols. Law sheep. $12.00.

The Question of Copyright. Compiled by Geo. Haven Putman, A.M. Second Edition. G. P. Putnam's Sons, New York. 1896. Cloth. $1.75.

A Treatise on the Railway Law of Canada. By Harry Abbott, Q. C. C. Theoret, Montreal. 1896.

A Manual of Elementary Law. By Walter D. Smith. West Publishing Co., St. Paul. 1896. Law sheep. $3.75.

The Law of Charitable Uses, Trusts and Donations in New York. By Robert Ludlow Fowler. The Diossy Law Book Co., New York. 1896.

Law and Practice for Justices of the Peace and Police Justices in the State of New York. By Patrick C. Duggan. Matthew Bender, Albany, N. Y. 1896.

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W McKinley
W. J. Bryan

The Green Bag.

Vol. VIII. No. 10 BOSTON. October, 1896.

McKINLEY AND BRYAN AS LAWYERS.

By A. Oakey Hall.

PRESIDENTS Washington, Harrison the first, Taylor, and Andrew Johnson were the only ones who filled the National Executive chair who were not lawyers. Ten of these professionals — Jefferson, Van Buren, Fillmore, Pierce, Lincoln, Hayes, Garfield, Arthur, Cleveland and Harrison the second — attained legal eminence irrespective of political preferment. And whosoever of the now contending candidates shall be elected, such legal succession will be continued.

Of the two contestants, Wm. McKinley has professional seniority with admission to the Ohio Bar in 1867; while the other William did not reach the Illinois Bar until 1883. The one has always confined his law office to Ohio; but the other removed to Nebraska, where the greater part of his professional life has been passed. Counsellor McKinley had his early schooling at the Academy in the village of Poland, in his native Ohio; and next entered the Meadville College — also the while teaching school — from which institutions, like hundreds of other collegians of the time (1861), his patriotism volunteered him to the tented Union field as a private soldier before he had attained his majority. Pleasantly coincident with this service it was that both of the after-Presidents, Hayes and Garfield, were officers in the Ohio regiment to which he belonged, together with Stanley Mathews, afterwards judge of the Federal Supreme Court. By successive promotions he reached the rank of Major; and was for a time staff officer with Major-General Hancock, an afterwards defeated candidate for the Presidency.

When peace ensued Major McKinley was pressed to remain in the regular army with promotion, but his yearning was towards legal science. He therefore took private law studies under Judge Charles E. Glidden of the Ohio Bar, and graduated from the celebrated Albany law school. During temporary residence in the capital of New York State, he there enjoyed attendance upon the illustrious bar of the New York Court of Appeals. Armed with his legal degree he was attracted from his youthful surroundings of locality to the city of Canton, because his sister was then a teacher there, and when formally admitted to the Ohio Bar he there opened a law office. His early cleverness as a lawyer can be best proved by the fact that in two years after admission he was elected prosecuting officer of the county; and soon obtained partnership with George W. Belden, then Federal District Attorney for the Ohio district. The request for alliance came from Mr. Belden, who one evening discovered an unexpected engagement for the following morning which would prevent his trying a jury case appointed for the same time. Young McKinley had already received Mr. Belden's interested legal notice, and the latter therefore in the emergency selected the youngster to take his place at nisi prius for the occasion. Being much hurried, the elder lawyer brusquely entered the young man's office, threw the papers of the coming case on the table, with the observations, "a case of mine for you to try, as I am called away; the papers will give you full instructions," and then left McKinley to his cogitations. The surprised young at-

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torney instantly addressed himself to diligent preparation well into the midnight; and on the next morning arose refreshed by honest sleep to the task. The Belden engagement elsewhere, however, lapsed, and the old lawyer, returning to the court, took a seat among the spectators in the rear and quietly watched the progress of his understudy and substitute. The result proved so satisfactory that immediately the elder offered the junior a partnership.

While a prosecutor, McKinley was the true judge advocate, never changing his official title into the private one of persecutor — that so often appertains by temptations to triumphs to the young prosecutor of the People's pleas — and properly tempering the justice of the case with mercy. For the foregoing Belden anecdote I am indebted to the manuscript notes of Wm. R. Day, senior member of the great law firm in Canton of Day, Lynch & Day, who has prepared for publication a charming sketch of his legal and political neighbor. Also for the following incident.

Young McKinley was defending a medical client sued for alleged malpractice in setting a broken leg. It was suspected, without means of proof being provided, that the claim was what in the legal slang of corporation damage suits is called "a fake snap." The plaintiff's counsel had ocularly exposed the mis or mal-practiced leg to the jury and oracularly showed the nodes which were the alleged palpable evidences of the want of medical skill, when McKinley — who has been many times remarked for skillful use of the *reductio ad absurdum*, exclaimed as the plaintiff was restoring the clothing of the limb, "Now let us see your other leg." Which, after very excusable objections as to policy from his attorney, was exhibited. The new exhibit — which proved to have been duly marked with india ink — showed the same nodes that were upon the other leg; and proved that, as McKinley wittily remarked, it was Dame Nature and not the Sir John or surgeon — for McKinley does not disdain a pun — who had been guilty of malpractice. The case came under what jurists term fraud, patent as well as latent, and McKinley won, to the applause of a crowded court-room. It was early remarked of McKinley the lawyer that he never took things for granted, and always thoroughly prepared his evidence, logically marshaled his facts as well as the points of an argument in banco, and usually led to a climax. He never slurred "an easy case," but gave to it the same attention that belonged to difficult or desperate contentions. He early excelled in oratory, and this excellence it was that attracted to him the attention of political leaders.

His seven terms in Congress beginning with the administration of President Hayes in 1876 and lasting over a dozen years, together with his election as Governor of Ohio, have become matters of history easily to be conned elsewhere.

While in the National legislature his legal attainments came into serviceable play as a member of the Committees on the Revision of Laws of Judiciary. While Governor he was more addicted to being his own legal adviser than to depending upon his Attorney-General for counsel; and doubtless the latter never thought of applying to his gubernatorial superior the stale saying touching client and fool.

"Confound the President," once said Attorney-General Bates, according to Washington gossip in Civil War time, "Lincoln is so excellent a lawyer under the maxim *eadem ratio ibidem lex*, that he is apt to advise himself off-hand in matters that appertain to the Department of Justice, and does not call for my official opinion." Which is a parallel case with that of Governor McKinley and the Ohio Attorney-General.

While lawyer McKinley was in Congress, its now venerable librarian often found him in the section of the Congressional Library devoted to jurisprudence, consulting author-

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ities. It had been remarked by lawyers and judges of the Ohio courts that, "if McKinley stated a proposition it was difficult to gainsay it, so thorough had been his examinations, and so ethically accurate were his comments." He had several times in arguments quoted Edward Burke in his noted saying, "Law combines the principles of original justice with the infinite variety of human concerns."

In that quality of respecting original justice in legal contentions, Mr. Bryan, according to the testimony of his partner Talbot, made tally with Major McKinley; and a favorite saying with Bryan was one quoted from the eminent Sergeant Hill, of the old London Bar, "Law that shocks equity is reason's murder." The friends of both competitors for the Presidential chair agree that in respecting natural ethics and the traditional ethics of their profession, neither one can surpass the other. Although the acutest lawyers in the House of Representatives were his fellows on the Judiciary Committee, Mr. McKinley's legal views, except for perhaps political differences, were never assailed.

During the Congressional recesses Major McKinley returned more or less to legal practice, as some of the volumes of Critchfield's Ohio reports show. Unlike some Congressmen, he declined practice in pension cases and before the Court of Claims; as also did Congressman Bryan, because each was unwilling to incur the suspicion of bartering subsequent votes as to claims through counsel fees. And both declined to follow the example of some other of their fellow members who would appear as private counsel before committees of the House or Senate, or among the Departments of the Government. Any shrewd outside observer of Congressional life in Washington knows that the feed lobbyist is not always, as the name strictly implies, a member of lobby or cloakroom only.

There was an appreciable difference between the legal beginnings of the two political competitors; for Mr. McKinley commenced his studies and his practice in a locality where he was not only known, but had become more or less noted and popular as a victorious soldier of the army. Although Mr. Bryan had begun practice at Jacksonville, Illinois, where he made an early marriage with an accomplished lady, who also obtained a legal diploma, and became his legal helpmeet as well as maritally, he sought as a permanent home the growing city of Lincoln, where, an utter stranger, he joined the Nebraska Bar. How well his associate students at the Union College of Law of Chicago, where he had received an LL. B., remembered his scholarship will appear from the following testimonial, and congratulatory letter which within a few days after his nomination they addressed to him, and which bears the signatures of Frederick M. Williams, Frank A. Smith, Frank Hall Childs, A. E. Case, J. Willard Newman, Samuel J. Lombard, William J. Marka, W. H. Pope, Alfred E. Holt, Louis P. Holland, Thomas W. Prindeville, Morris P. Trainor, John H. Rollins, Grose Hall, O. P. Seward, J. H. Chamberlain and Taylor E. Browne, who are all now Chicago practitioners.

"We the undersigned members of the class of '83, in the Union College of Law, who now reside at Chicago, prompted by a fraternal spirit, arising from our college associations with yourself and from a just pride in your splendid achievement, write — without regard to political affiliations or individual views on pending political issues — in this expression of our high appreciation of your fidelity to your honest convictions, and the manly qualities that have enabled you to so effectively carve out of the course of events the position before the American people you have the distinction to occupy. As a class recognizing — from the inception of our acquaintance and association with you to the termination of our

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college course — your transcendent qualifications for public life; and as attentive observers of your progress since the termination of that course, we write in extending to you our hearty congratulations, believing you will prove the able and sincere exponent of the principles of which you are now the chief representative."

Young Bryan's first case was at Jacksonville before a justice of the peace, for the collection of an assumpsit debt of forty-four dollars, with a ratio in interest and costs to his fee of sixteen dollars to one. His progress at the Lincoln bar was tedious, for it had meritorious and older members. His first case there was in the Christmas week of 1887, with a plaint for an injunction. Another suit of a similar chancery character in the ensuing spring brought him additional notoriety, but it was not until 1889 that he can be said to have successfully attacked the bandaged vision of Themis.

Then he championed a damage suit before a jury for an injured client against the Chicago, Burlington and Quincy Railroad, wherein he succeeded against a strong array of counsel. His practice began to be varied in character. He won successively a divorce suit, a mandamus action, and was chosen standing attorney for a local manufacturing corporation. His divorce suit became noted from the large alimony that he obtained for his client, Mrs. Mattie Herrick.

He had now associated with himself A. R. Talbot, Esq., and later the firm became Talbot, Bryan & Allen. How promising and profitable had been their business appears from a suit brought by it in 1891, to obtain four thousand dollars counsel fees from an ungrateful client. In the same year against odds he excited attention by an action for insurance moneys against the German-American Insurance Company: in which that corporation, without success, appealed from the two thousand dollars verdict Mr. Bryan had obtained. He appears to have been, as the calendars of the Supreme Court of Nebraska show, the favorite counsel, often employed against the Chicago, Burlington & Quincy Railway, and also the Chicago, Rock Island and Pacific Railroad Co., because he had become recognized as a serviceably persuasive and oratorical advocate before juries, especially in cases where sympathy for an injured plaintiff existed. He had a magnetic presence and address, like McKinley, nor did either disclaim a liberal use of tropes and figures. Your Western jury cares more for oratory than an Eastern twelve.

Like lawyer McKinley, lawyer Bryan soon attracted political attention, and was sent to Congress, where both crossed forensic swords — the one being, as may be said, counsel for the plaintiff protective tariff, against the other as counsel for defendant revenue tariff, although Congressional records show that on a currency question — wherein now they are retained by their parties against each other — their opinions sometimes retained them on the same side. Mr. McKinley equally with Mr. Bryan excelled in oratory, although when at the bar, lawyer McKinley preferred logical force to floridity. Mr. McKinley had the advantage of age and experience, but Mr. Bryan held the confidence of youth, and if ever taunted with being a boy orator, doubtless he thought of the celebrated speech of Lord Chancellor Thurlow, when taunted by the Duke of Grafton in the House of Lords with his youthfulness. That speech began — a favorite with schoolboys on speech days — "My lords, the atrocious crime of being a young man," etc. Neither McKinley nor Bryan, as it has been remarked by their associates, ever lost the pose and manner which every lawyer legislator seems to have whenever addressing House or Senate, as being the pose and manner of addressing a jury — the pose somewhat satirized by Dickens in the sentence, "Bar, with his jury droop and eyeglass," and for which the late Roscoe Conkling was noted both in courtroom and senate chamber.

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Both orators were always in demand on patriotic public celebrations, either in the Western or Middle States. Notably among these was an oration delivered by Mr. McKinley at the Metropolitan Opera House on the evening of May 30, 1889, before a mass-meeting of delegations of the "Grand Army of the Republic," on the announced subject, the American Volunteer, and at which veterans of the New York Bar largely sought admittance. Both Mr. McKinley and Mr. Bryan are noted for the utterance of clever epigrams and laconic sayings even in legal arguments, and it would be difficult for an expert critic to decide on this head a superiority.

What may be termed Mr. Bryan's star law case will be found in the 156th volume of United States reports at page 335, in Connell *v.* Smiley, a peculiar case, elucidated by the opinion of Chief-Justice Fuller in favor of Mr. Bryan's client as appellee. The latter had begun in the Nebraska State court an action to quiet title to land which had been antagonistically sold at private sale and also under execution. The defendants, of whom the present appellant Connell was one, removed the cause into the Federal Circuit Court, some intervenors residing in different States, although plaintiff and the main defendant were citizens of Nebraska. The Bryan client obtained decree quieting title in himself, when the Connell party saw fit to advantage his own wrong — if it was a wrong — claiming erroneous jurisdiction as to parties in the Federal court, and moved to remit the cause back to the State court. The former court declined to oust itself, and the Supreme Court at Washington affirmed. The opinion largely based upon the Bryan brief is valuable to the profession as settling the theretofore much mooted question, "Can jurisdiction separate two litigating citizens of the same State from their State court into a Federal court, because intervenors are citizens of another State? Thus Counsellor Bryan was successful in all the tribunals."

At their home bars each competitor for the Presidency stands *primus inter pares*, and whomsoever may be chosen to succeed such legal incumbents of the White House as were Jefferson, Pierce and Arthur, the legal voter can satisfactorily make his choice for ballot in consonance with sympathy for a professional comrade.

THE TRIAL OF DR. JAMESON IN ITS LEGAL ASPECTS.

THE political aspects of Dr. Jameson's trial fall beyond the purview of a legal magazine; its dramatic aspects are open to the same observation, and have, moreover, had ample justice done to them in the American press. Its legal aspects are, however, worthy of, and they will repay careful consideration. And first a word or two as to trial at bar, the juridical machinery adopted in this *cause celèbre*. In any case in which the Crown is a party, or its interests are involved, the Attorney-General may obtain a trial at bar, *i.e.* a trial in theory before the whole Queen's Bench Division — in practice before three or more judges of it. In modern times this method of procedure has been adopted only in cases of the widest importance. It may suffice to refer to the cases of Parnell and O'Connell, as instances of the class of cases in which it is brought into operation. The details in which a trial at bar differs from an ordinary trial are not numerous. The preliminary steps, such as the lodging of pleas and the preparation of the jury panel, are taken in the Crown Office. A Crown Office official attends the court at the trial, calls over the names of the jurors, and receives their verdict when returned.

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Each of the presiding judges has the right to charge the jury separately, and students of constitutional law will recollect the curious confusion produced at the trial of the Seven Bishops (who were tried at bar in the reign of James II) by the fact that the four presiding judges delivered directly conflicting addresses to the jury in regard to the question whether the conduct of the Episcopal defendants amounted to sedition. No appeal lies from the decision of the judges at bar, either to the Court on Crown Cases Reserved or to the whole of the judges of the Queen's Bench Division. But where the charge against a defendant tried at bar is misdemeanor, he may, if convicted, appeal at once to the judges who tried him for a new trial, and then, if they uphold the conviction, to the court of appeal. This course was actually taken by Mr. Bradlaugh after his conviction in 1885 for a breach of the Permissory Oaths Act. We may pass now to the legal points actually taken and decided on Dr. Jameson's trial. First came a series of objections to the indictment, pressed with consummate skill by Sir Edward Clarke, the leading counsel for the defense. The material clause in the indictment on the purpose of their argument was as follows: "That they (*i.e.* the defendants) on Nov. 1, 1895, and on divers days between that date and December 30, 1895, *within the limits of Her Majesty's dominions and after the coming into operation therein of the Foreign Enlistment Act of* 1870, and without the license of Her Majesty, were engaged in the preparation of a military expedition to proceed against the dominion of a friendly state, to wit, the South African Republic; and afterwards, to wit, on Feb. 25, 1896, and at the time of taking this inquisition, were within the county of London, and within jurisdiction of the Central Criminal Court." The first objection taken to the indictment turned on the word *therein* in the passage quoted above. It was said that this word was ambiguous. It might mean that there was a definite place in Her Majesty's dominions at which the Act of 1870 had come into operation. In that case the indictment was bad because the place was not specified, or *therein* might signify that the Act had come into operation at *all* places on Her Majesty's dominions, in which case the impossible burden of proving this allegation affirmatively rested on the Crown.

The judges overruled this objection — the Lord Chief Justice remarking that even in the construction of a criminal pleading some regard must be paid to the ordinary understanding of language and common sense. It is curious and noteworthy, by the way, how slow the law of England is to follow the trend of modern civilized jurisprudence with reference to the amendment of criminal pleading. Even Scotland under Lord Kingsburgh's Act has largely got rid of technical and hairsplitting objections to the wording of indictments. But the Sassenach still lingers obstinately in the rear. As in most other cases, however, the conservatism of English lawyers in this matter springs from a respectable root, viz., their desire that a defendant in a criminal case should clearly know the offense with which he is charged. A *via media* between undue laxity and the present absurd strictness might readily, however, and ought to, be discovered. The two remaining objections urged against the indictment of the Raiders were of a more substantial character, viz.: (1) that the defendants were not alleged to be British subjects, and (2) that the offense was not sufficiently alleged to have been committed within the Queen's dominions. On these points the court held that the Foreign Enlistment Act was not limited to subjects of the British Crown *within* the Queen's dominions, or incapable of reaching British subjects beyond them — two very important glosses, it may be added, on the text of the statute. The only matter remaining for notice— and that of a brief description — is

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the skill with which the Lord Chief Justice first extracted from the jury a special verdict and then directed them to return a general verdict of guilty in their findings. That he was strictly within his legal rights in taking this course is certain, and it was fortunate that he took it, for the jury were evidently disposed to acquit the defendants, a result which would have been unjust and would have exercised a mischievous influence on England's position in South Africa. This deeply interesting trial will not be without consequence of a permanently beneficial character if it induces England to take early steps towards defining her relation to her numerous and increasing "charterlands" in such a way as to obviate any questions as to whether the Foreign Enlistment Act applies to them in future.

THE MUSWELL HILL MURDER.

A CRIMINAL *cause célèbre* of the most sensational and romantic order has just been concluded at the Old Bailey. Muswell Hill is a small suburb in the north of London. As its name indicates, it stands on an elevation and is, it may be added, still imperfectly brought within the range of the manifold activities and life of the great metropolis of the British Empire. Woods are to be found in its vicinity; the weekly service of trains to it is not very extensive, and on Sundays ceases altogether; and there are numerous houses surrounded by large gardens and plantations, which have, as yet, successfully resisted the attack of the equalizing and leveling villa or flat. One of these houses is — or, perhaps, in view of possible changes it should be said was — named Muswell Lodge. It is an irregular building, grouped round about a square tower, at the top of which there is a small glass conservatory. On the north side it is bounded by the highroad, while on the south and west, beyond the garden, stretches a wide area of tolerably dense woods, separated from the Muswell Lodge gardens only by a wooden paling, a ditch, and a dense hedge.

At the time when the present story commences, the owner and occupant of this property was an old man of over seventy years of age, Mr. Henry Smith. Although he had friends in the neighborhood, and was highly esteemed and liked — especially by the little children, for whom he had always a kind word when he met them playing in the wood — he lived alone, protected only by a spring-gun, which his gardener, a man named Webber, adjusted the last thing at night, and by electric bells on the lawn and walks. He was reputed to be very rich, and had, in fact, a considerable sum of money, about £115, in the house at the time of his murder. One night in February last, Webber placed the spring-gun in readiness as usual before leaving off his work. He returned at half-past ten and saw that everything was right. Next morning when he came to the Lodge and sought admittance no one answered. He scrambled into the garden and proceeded to the window facing the lawn. It had evidently been tampered with. He looked in and saw someone lying on the floor. Webber at once gave the alarm; friends assembled and an entrance was effected. Then a terrible sight was revealed: old Mr. Smith lay dead on the floor, his limbs bound with strong ligatures, and his face and head, which were covered with a bag, bearing clear traces of having been battered with burglars' jemmies. His drawers had been rifled of their contents. Further inspection by the police discovered two jemmies stained with blood, a bull's eye lantern, the wick of which had been mended with a piece of shirt or dress flannel, and footmarks in the garden. For some weeks the public

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anxiety that the murderers should be arrested and brought to justice had to remain content with such satisfaction as it could derive from the ordinary rumors as to the discovery of clues and from a few mistaken arrests. One evening, however, all England rang with the news that two notorious criminals, Fowler and Milsom, had been arrested in Bristol after a desperate struggle.

The ingenuity which put the police on the track of these ruffians, who proved, indeed, to have been the murderers, cannot possibly be too highly praised. Shortly after the date of the outrage an acute detective noticed the fact that two "ticket of leave" men of notoriously bad character had disappeared from their usual haunts. The "bull's eye" suggested an idea to him. He gave it to a little boy named Wilson, and directed him to get into conversation with Milsom's brother, who was also a lad, and "draw" him upon the subject. The boy asked young Milsom whether he would buy a "bull's eye" from him. The lad answered "yes," as he had lost one, and immediately claimed the police lantern, when he saw it, as his own. The two youths were engaged in disputing the question, when a rustic (the detective in disguise) came up and succeeded in getting the scene of the discussion transferred to the nearest police station, where he elicited from young Milsom the fact that he had mended the wick with scraps of flannel with which his sister-in-law had been making a dress for her baby, and that his brother had borrowed the lantern from him, and told him to say it was lost if any inquiry was made. Armed with this clue the detective pursued his investigations further and soon discovered that the elder Milsom, and Fowler, who had only been released from penal servitude the month before the murder, had left London together. He and other officers at once set to work to run them down. They traced them back and forwards through the English midland and southern counties, till at last they found that the desperadoes were living with a traveling showman, named Sinclair, and his wife in Bristol. Surrounding the house at night, the police entered, and quickly ascending the stairs, burst into the room where the whole party were seated. Milsom surrendered almost without a struggle. But Fowler fought with the strength and fury of a tiger, and almost succeeded in getting possession of a revolver, with which he would have made short work of his assailants. Ultimately, however, he was felled by a baton, and the arrest was successfully effected. Mr. and Mrs. Sinclair were speedily released from custody, and Fowler and Milsom were brought to London for a preliminary investigation of the case against them before the Highgate police court. On the second day of the inquiry it transpired that Milsom, whose courage was of a somewhat evanescent character, had made a confession, in which he admitted his share in the burglary, but threw the whole responsibility for the murder on Fowler. In substance his story was as follows: —

Fowler called on him after his release from prison and told him that he had discovered a good plant for a burglary at Muswell Hill. Milsom agreed to take part in the job, and the two criminals, traveling by a circuitous route, reached Muswell Lodge late on the night of the 13th. They climbed over the gate and lay concealed in the shrubs for an hour or more. Then Fowler said it was time to get to work, and they moved slowly across the lawn to the nearest window, carefully avoiding the spring-gun and electric bells, of whose existence they were of course perfectly cognizant. A window was soon opened and Fowler crept in — Milsom remaining outside. In a few minutes piercing cries were heard and then all was silent again. Milsom then followed Fowler into the house and found that old Mr. Smith was dead. They took all the money on which they could lay their hands — some £110 — and decamped with it. This confession was obviously

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inspired with the hope that the Crown would allow Milsom to turn Queen's evidence. But this hope was doomed to disappointment. In the first place, Fowler promptly issued a confession of his own directly implicating Milsom in the actual murder. Then both the jemmies discovered were blood-stained, and lastly, the medical evidence showed that the knots in the ligatures, with which Mr. Smith had been bound, had been tied the one by a right-handed and the other by a left-handed man. The prisoners were promptly committed for trial, and were tried at the Old Bailey in May last before Sir Henry Hawkins. They were, of course, found guilty and sentenced to death.

Two dramatic episodes occurred during the trial. When the jury retired to consider their verdict the judge left the court. The two prisoners were seated in the dock with a powerful warden between them. Fowler looked tired and exhausted, and some of the spectators with anti-police sympathies were covertly ridiculing the stories of the police as to his marvelous strength. The veracity of the police was, however, suddenly and strikingly vindicated. Fowler was observed to grin, gnash his teeth and foam at the mouth for an instant (symptoms, by the way, which have led very many experts to pronounce him to have been an epileptic criminal), and then bounding to his feet with the spring of a tiger, he hurled the warden out of his way and seized Milsom with a grasp which, unless immediately relaxed, would have terminated that wretched craven's life without the aid of the executioner. In a moment the court was in an uproar. Ladies screamed and fainted. Burly officers leaped into the dock, and soon nearly a dozen men had Fowler in hand. Milsom was torn from his grasp. But the desperate criminal hurled his assailants first to one side of the dock and then to the other, and it was not till after a struggle of about twenty minutes that he was overpowered. The police critics have been very subdued since that remarkable scene, and no one who witnessed it will ever forget it. After the death sentence had been pronounced Fowler created another sensation by declaring that he had been the perpetrator of a burglary for which two men, Watts and Hall, were then in custody, and have since been (properly) sentenced to fifteen years' penal servitude. The confession was proved to be false, and was prompted merely by a rough and not discreditable desire on the convict's part, now that he was passing out of the region of human hope, to do a good turn to two "pals" in trouble. The chief interest of this episode is of a legal character. An application was made at the trial of Watts and Hall to summon Fowler as a witness. Sir Henry Hawkins refused to accede to it. But the question indirectly raised by it — viz. the competency of a condemned convict as a witness — was brought to an issue a few days later in the case of Mrs. Dyer, a human fiend, who has recently been hanged for a series of baby-farming murders. Her daughter, Mrs. Palmer, was awaiting trial as an accessory before the fact to her crimes. A subpœna was served first on the chief warder of Newgate gaol, where Mrs. Dyer was confined, and secondly on the Home Secretary, with conduct money, requiring the production of Mrs. Dyer as a witness on Mrs. Palmer's trial a week after the date fixed for her execution. The Home Secretary checkmated this move by intimating that the Crown did not intend to offer any evidence against Mrs. Palmer. But he also stated that Mrs. Dyer, being civilly dead, was legally incompetent as a witness. It is very doubtful, however, whether, since the abolition of forfeiture in 1870, this is sound English law. But the evidence of a condemned felon ought to be taken, if possible, on commission. The presence of a desperate scoundrel like Fowler in the witness-box is not a thing to be desired.

The closing scene in the lives of the Mus-

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well Hill murderers did not fall below the high dramatic level to which the earlier stages in the tragedy attained. Another convict — a man Seaman — was to be hanged along with them. Mrs. Dyer's execution had been arranged for the same day, but an inspection of the cross-beam of the gallows rendered it doubtful whether it would bear the quadruple strain. And so another day of life was meted out to Mrs. Dyer. On the day before the execution she was moved to Holloway gaol, in order that she might not hear the dismal bell of St. Sepulchres tolling the knell of the departing souls of her fellow convicts, or the dull thud of the collapsing door. She was brought back when all was over, and was obliged to walk, on the way to her cell, over the graves of Seaman, Fowler and Milsom. On the morning of the execution of the Muswell Hill murderers a great crowd gathered outside Newgate to watch for the rising of the black flag which announces that justice has been satisfied. There was a pretty general expectation that Fowler would die hard, and sounds of scuffling and cries were heard before the gloomy death-signal ascended. Nothwithstanding the police statements, and coroner's jury's verdict, that the execution was carried out in an absolutely decorous manner, several persons still persist in asserting the reality of these impressions. The phenomenon is an instance of the familiar hallucinations of hearing, which great mental excitement is apt to produce.

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THE ENGLISH LAW COURTS.

IX.

COURTS OF CRIMINAL JURISDICTION.

THE COURT FOR CROWN CASES RESERVED.

THE Court for Crown Cases Reserved has already been described in a previous number of THE GREEN BAG, and a brief reference to it here must, therefore, suffice. Any five or more judges of the Queen's Bench Division — the presence of the Lord Chief Justice being essential unless he is disabled by physical or other reasons from attending — may sit as a Court of Criminal Appeal to determine questions of law reserved for their consideration at the assizes or at quarter sessions. This tribunal is called the Court for Crown Cases Reserved. The English judiciary are at present pretty sharply divided as to the desirability of establishing a Court of Criminal Appeal. Immediate legislation on the subject is not to be expected.

THE ASSIZE COURTS.

England and Wales are divided into nine circuits, over which the judges travel periodically for the trial of civil and criminal business. The judges go on circuit in virtue of the following commissions from the Crown: (*a*) a commission of oyer and terminer by which the persons named therein are directed to inquire, hear (*oyer*, *audire*) and determine (*terminer*) treasons, felonies and misdemeanors under their commission. The commissioners can only "hear and determine" charges into which they have previously inquired by means of the Grand Jury. Accordingly a second commission is issued, (*b*) the commission of gaol delivery, in pursuance of which the commissioners are authorized to try every prisoner committed to gaol upon any charge whatever. (*c*) The commission of *nisi prius* is for the trial of civil causes. The term is derived from an old statute of Edward I, and its origin, as most students of history are aware, is as follows: writs called writs of *venire* were formerly sent to the sheriffs of the various counties directing them to bring up the jurors to the courts at Westminster for the trial of civil actions on a certain day *unless before* that day (*nisi prius*) the King's justices came into the several counties, in which case the jurors were to be brought before them as justices of assize. Lastly (*d*), there is the commission of the peace, by which the judges are enabled to require the attendance and assistance of the local justices in such matters as lie within their knowledge and jurisdiction. Queen's Counsel of the requisite standing frequently sit as commissioners of assize when the exigencies of litigious business require it. This temporary elevation to the Bench usually portends the nomination of the commissioner to a puisne judgeship at an early date. Mr. Gully, Q. C., is a notable exception to this rule. On two occasions at least he acted as commissioner, and would have been raised to the Bench but for the fact that he held his seat at Carlisle by a slender majority, and the party interests rendered it inexpedient that it should be exposed to the risk of a bye-election. Mr. Gully had his reward, however, in his recent promotion to the speakership of the House of Commons. County court judges also are eligible to sit as commissioners, and one of the last acts of the late Lord Chancellor Herschell was to employ his friend Judge Chalmers of Birmingham in this capacity. Everyone regarded this as the first step towards the promotion of this very able judge to the Bench of the High Court. But the defeat of the Liberal

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Government prevented Lord Herschell from setting this precedent, if he intended to do so. An unattached Queen's Counsel, sitting as commissioner, is paid at the ordinary judicial rates for his services. A county court judge, acting in that capacity, is merely allowed his expenses — which are calculated, however, on a pretty liberal scale — the conception of course being that he is already in the government service.

Each of the circuits has its own Bar, bar mess, by whom matters of etiquette and discipline arising on circuit are determined. A barrister may apply for admission to a circuit however short or long a time he has been called; but in general any change of circuit must be effected within two years after call. In former days it was usual for members of a circuit to attend the courts in the different assize towns with tolerable regularity. But nowadays many men run down only to the towns where they either have, or are likely to get work. Others still cling to the ancient ways. Recently the assize system has been extended, and practically continuous sittings in London and in the provinces have been established. This change was intended to meet the complaints of both metropolitan and provincial suitors that they could not get their cases tried. It has not however, worked well, although some of the judges, notably Mr. Justice Vaughan Williams, performed miracles of expedition in keeping up a *va-et-vient* between the circuits and London, and everything points to its abandonment in favor of either the permanent localization of branches of the High Court in the provinces or the elevation of the status of county court judges, — the High Court becoming largely a Court of Appeal.

Neither the Lord Chancellor nor the Master of the Rolls, nor the Chancery nor the Probate, Divorce and Admiralty judges go on circuit. The Lords Justices of Appeal have frequently done so in recent years for the relief of the puisne judges.

THE OLD BAILEY, NOW THE CENTRAL CRIMINAL COURT.

The Old Bailey has played a part of an extremely tragic and interesting character in English juridical history. It was in 1834 superseded by statute (4 & 5 Will. IV, c. 36) by the Central Criminal Court, created for the trial of treasons, felonies and misdemeanors committed within the city of London, the county of Middlesex, and certain specified parts of Essex, Kent and Surrey. The judges of the Queen's Bench Division, including the Lord Chief-Justice of England, sit at the Old Bailey. The other judges of the Central Criminal Court are the Recorder of London and the common serjeant. The Recorder of London is chosen by the Lord Mayor and Aldermen and attends the business of the city when summoned by the Lord Mayor. The Local Government Act, 1888, sec. 42 subj. 14, provided however, that after the vacancy next after the commencement of the act "no recorder shall exercise any judicial functions unless he is appointed by Her Majesty to exercise such functions." This provision first took effect in Feburary, 1892, on the death of the then Recorder, Sir Thomas Chambers. The present Recorder is Sir Charles Hall, M. P. for the Holborn Division of London, and formerly Attorney-General to the Prince of Wales. He is a most courteous, competent judge, and preserves the mean admirably between undue leniency and excessive severity. The common serjeant is also a judicial officer of the Corporation of the city of London, and is an assistant to the Recorder. The present common serjeant, Sir Forrest Fulton, had a large criminal practice at the bar, and makes an excellent administrator of criminal justice, although he is sometimes disposed to be rather severe. He has great faith in the efficacy of the "cat o' nine tails" as a deterrent from acts of criminal violence, and carries his views unfalteringly into practice wherever the law allows him to do so. When, owing to strong local prejudice against a pris-

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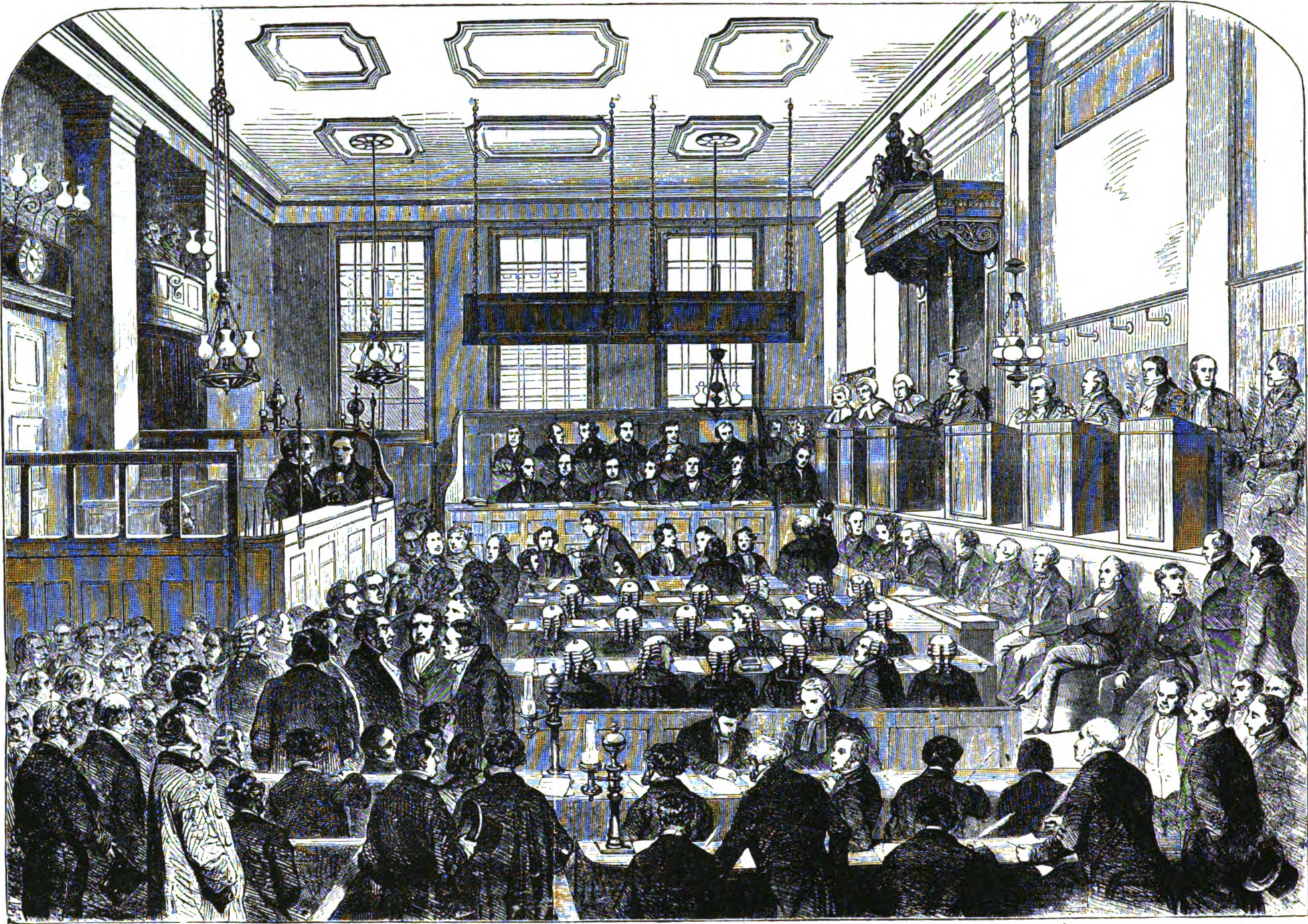

THE OLD BAILEY.

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oner personally, and not merely against his trade or profession, a fair trial cannot be had on circuit, the Queen's Bench Division may, under the statute 19 Vict. c. 16, which was passed for the protection of William Palmer, the poisoner, in 1856, order the case to be removed to the Central Criminal Court. By a statute of 21 Henry VIII, the King was enabled to grant commission under the great seal to the Lord High Admiral and his deputies to try certain, and, after 39 Geo. III, 137, all offenses committed on the high seas. This jurisdiction formerly exercised by the judge of the High Court of Admiralty is now practically vested in the Central Criminal Court and the judges of assize. In the case of foreign ships the Admiralty jurisdiction extends to all the territorial waters in Her Majesty's dominions, and includes the high seas to the distance of one marine league from low water mark. All British ships are within it, not only on the high seas but in the great foreign rivers as far as great ships go. Under the Merchant Shipping Act, 1854, sec. 267, the Admiralty jurisdiction extends to offenses committed by any master, seaman or apprentice who, at the time of, or within three months before the offense, was employed in any British ship ashore or afloat, out of Her Majesty's dominions.

SESSIONS, QUARTER OR BOROUGH.

Quarter sessions are held four times a year at stated intervals by the whole body of the justices of the peace in a county, and by the recorder in a borough, to try certain indictable offenses and hear appeals from petty sessions. The jurisdiction of quarter sessions is civil and criminal, and arises from the commission of the peace itself, as settled by the statutes 18 Edw. III, ch. 2, and 34 Edw. III, ch. 1. Originally any felony or misdemeanor committed in the county in which the quarter sessions sat, fell within their jurisdiction. But it was the practice of the justices to remit the more serious cases to the assizes, and the statutes 5 and 6 Vict. ch. 38, excepted from their jurisdiction treason, murder, any capital felony, blasphemy, perjury, forgery, bigamy and many other offenses. Quarter sessions also hear appeals against very many summary statutory convictions, have power to try minor offenses against the game-laws, and have also jurisdiction under the Debtor's Act, 1869. The qualification for a recordership is five years' standing at the Bar. The appointment is in the gift of the Crown, i.e., for this purpose, the Home Secretary. A recorder receives "such yearly salary, not exceeding that stated in the petition on which the grant of a separate Court of Quarter Sessions was made, as Her Majesty directs." The salaries of recorders are often very small (one of the largest, if not the largest, is enjoyed by Mr. Hopwood, Q.C., the present Recorder of Liverpool, who has £1000 or £1500 a year — Mr. Hopwood is the chief apostle of the "short sentence" theory in England); but in spite of this fact these appointments are very much sought after, as they do not interfere with private practice, and usually lead to a higher judicial office.

THE METROPOLITAN POLICE COURTS.

The history and literature of the Metropolitan Police Courts — a remark which also applies, by the way, to the Old Bailey — have been admirably handled by Mr. Holloway in a recent number of the GREEN BAG, It may suffice therefore to state that besides the Mansion House and Guildhall in the city, there are a number of police courts in and about the metropolis, situated severally in Bow Street, Covent Garden, Vincent Square, Westminster, Great Marlborough Street, Clerkenwell, Dalston, Worship Street, Shoreditch, Kensington Lane, Lambeth, High Street, Marylebone, Blackman Street, Southwark, Thames Police Court at Stepney, Greenwich and Woolwich, Ham-

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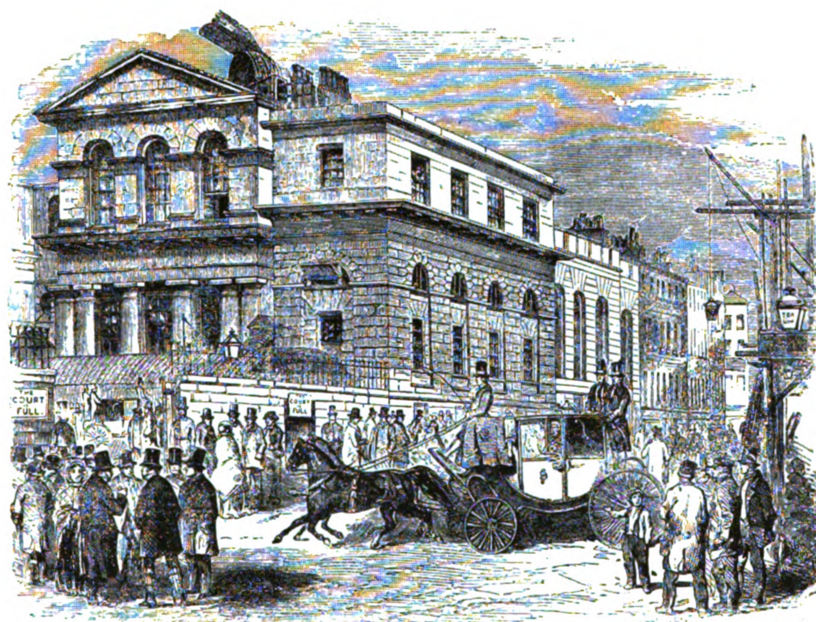
mersmith and Wandsworth. These courts are presided over by stipendiary magistrates — barristers of at least seven years' standing — each of whom receives a salary of £1500. The appointment rests with the Home Secretary, and it is a moot question at the Bar whether the office of a stipendiary magistrate is preferable or not to that of a County Court judge. The salary is the same in both cases. The stipendiary magistrate lives in London, and has no traveling. On the other hand, the County Court judge's work is more varied and pleasant. The balance between these conflicting advantages and the reverse is of course struck according to individual taste.

The head of the present metropolitan magistracy is Sir John Bridge. Born in 1824, and educated at Trinity College, Oxford, where he took first-class honors in mathematics, Sir John was called to the Bar in 1850. He was made a police magistrate in 1872, and raised to the chief magistracy and the honor of knighthood in 1890. He is rather testy with counsel and solicitors, but is an extremely learned lawyer and a most accurate judge. One of Sir John Bridge's best decisions was delivered in the missing word competition prosecution. He is great in extradition cases.



THE OLD CENTRAL COURTS.

THE GRAND JURY.

The Grand Jury is a body of gentlemen, not less than twelve nor more than twenty-three in number, summoned by the sheriff to hear accusations and present indictments at quarter sessions, assizes, or gaol deliveries. The grand jury, after having been charged — it having had the law as to the various offenses awaiting trial explained to them — by the presiding judge, retire to their room, and hear evidence in support of each indictment. Their foreman has power to administer an oath or affirmation to any witness. The verdict of the grand jury, which must

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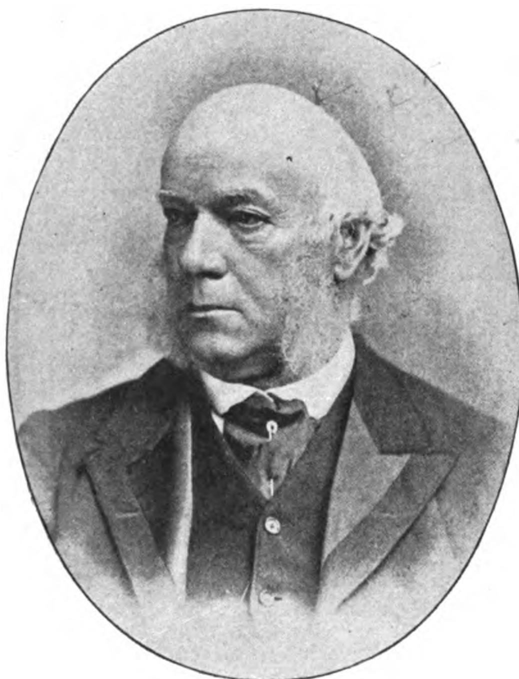
be carried by a majority of twelve at least, is endorsed on each indictment, which is then handed to the clerk of court by the foreman and read aloud by him. If it is *no true bill*, the accused is discharged; if *true bill*, he is held; for the verdict of the grand jury is simply an accusation. The grand jury is a relic of the old law under which juries were witnesses to, rather than judges of, facts.

THE CORONER'S COURT.

Prior to 1888, the election of coroners was governed by the following rules. The sheriff, on receiving a writ *de coronatore eligendo*, summoned a special county court for the election of a coroner. All persons having a legal interest in land amounting to freehold were qualified electors. The court was held not less than seven nor more than fourteen days after the receipt of the writ. If a poll was demanded, the sheriff adjourned the court to the next day but one at eight A.M. Every elector was sworn before polling. The sheriff's declaration was final. The expenses of the sheriff, the polling officers and the clerks (the last named of whom were not allowed more than one guinea each per day) were divided in equal proportion between the candidates. Under Sec. 5 of the Local Government Act, 1888, however, county coroners are no longer elected as formerly by the freeholders. On any vacancy occurring in the office, the writ *de coronatore eligendo* is directed to the County Council of the county instead of to the sheriff, and the County Council thereupon appoints a fit person not being an alderman or councillor to fill the vacancy, and in the case of a county divided into coroners' districts, assign him a district, and any person so appointed has like powers and duties and is entitled to like remuneration as if he had been elected by the freeholders.



SIR JOHN BRIDGE.

Nothing in the Local Government Act, however, respecting the appointment of a coroner has altered the jurisdiction of a coroner for the whole county, or any power of removing such coroner whether by writ *de coronatore exonerando* or otherwise, and all writs for the election or removal of a coroner are altered so as to give effect to that provision. These provisions do not apply to coroners for county boroughs. A person who holds the office of coroner is not qualified to be elected as an alderman or a councillor for the county for which he is a coroner. The duties of the coroner are practically judicial only. Upon receiving notice from the proper officer that any one is "slain or suddenly dead," the coroner issues his written precept or order to the constables of the parish in which the death took place, desiring them to summon a jury of not less than twelve, sometimes of twenty-three persons, before him at a particular time. The coroner has power to compel the attendance

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of witnesses before him, to administer oaths, and to impose a penalty of 40 shillings for non attendance. The inquest is conducted *super visum corporis* if it is necessary for the coroner and each of the jury to view the body of the deceased. It seems that the coroner may exclude reporters from an inquest. The coroner may require any qualified medical practitioner to give evidence before him and make a *post mortem* examination. The fee for attendance at an inquest as a medical witness is one guinea; the fee for making a *post mortem* examination and attending to give evidence is two guineas. The coroner is bound to take down the depositions of every witness at the inquest in so far as it is material. After hearing the evidence the jury return their inquisition or verdict, which is signed by each of the jurors and the coroner. If the jury find a verdict of murder against any one, it is the duty of the coroner to commit him or issue a warrant for his committal, and any application for bail must be made to the Queen's Bench Division. A coroner has now power to take bail for a person against whom the jury have returned a verdict of manslaughter. The salary of a coroner for the county was formerly fixed by agreement between himself and the justices of general or quarter sessions in the county for which he acted or, in the event of dispute, by reference to the Home Secretary. Under the Local Government Act, 1888, this power is transferred to the County Council. A coroner convicted of extortion or willful neglect of his duty or misconduct in his office, or guilty of exercising corrupt influence over his jury or of official misbehavior or incompetent for his work, may be removed by the Lord Chancellor, and his jurisdiction is not altered by the Local Government Act, 1888.

LONDON COUNTY SESSIONS.

The Quarter Sessions for London are presided over by a paid chairman appointed by the Crown on the petition of the County Council. The office is at present held by Sir Peter Edlin, an able and faithful, if somewhat austere, judge. His salary is £1500 a year, and although the assessment appeals have been added to his jurisdiction, the County Council have most unwisely and unfairly taken advantage of a clause in the Local Government Act, 1888, limiting the salary of the chairman to the amount stated in the petition for his appointment, to avoid increasing it. The result has been a most unfortunate deadlock, so far as the assessment appeals were concerned.

The criminal jurisdiction of the House of Lords on impeachments and in the trial of peers for treason and felony, a privilege which does not extend to cases of felony, has been referred to in a previous paper.

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THE ANGLO-SAXON AND ROMAN SYSTEMS OF CRIMINAL JURISPRUDENCE.

BY M. ROMERO, MEXICAN MINISTER TO THE UNITED STATES.[1]

I HAVE often heard, during my official residence in Washington, comparisons made between the Anglo-Saxon and Roman systems of criminal jurisprudence, generally very disparaging to the latter system, and this leads me to believe that our own, which is based on the Roman, is not quite well understood in this country. This, and not a desire to indulge in odious comparisons between the two systems, is my apology for writing a brief article intended to show that our system is not so defective as some believe. I think that in doing this I render a service to the good understanding between the United States and its Southern neighbors.

This subject has always had a great interest for me. Having been educated at home as a lawyer, I have desired to study and practically to compare the various systems of jurisprudence of different countries, believing this to be one of the best ways to understand the philosophy of that science. I regret, however, that the public duties which have devolved upon me during my whole life, and my long absence from home, depriving me of the opportunity of practicing law in Mexico, have prevented my becoming better acquainted with all its provisions and making a specialty of the study of jurisprudence. The same cause has prevented my studying fully the practical workings of the Anglo-Saxon system of jurisprudence, as existing in the United States. It is therefore with great reluctance that I approach such a difficult subject, believing, as I do, that I am not fully competent to treat it as thoroughly as I should like.

While I would not attempt to depreciate the Anglo-Saxon system of jurisprudence, I think the Roman system is also entitled to some regard. The most remarkable of the Roman institutions, and the one which we might say survived the downfall of the Roman Empire, and the incursions of the barbarians with their feudal system, was the civil law; it contains all that was best of former ages and peoples. The advancement of old Etruria, the wisdom of Solomon and Lycurgus, the principles of the legislation of Minos, and all that was of permanent value to Egypt, Phoenicia, Chaldea and the foremost nations of the ancient times, were incorporated into the laws of the ten tables, which were engraved four hundred and fifty years before Christ; and therefrom was developed the wonderful legal system which culminated in the institutes of Justinian in the year 534 of our era, a system which did more than anything else to assimilate to the Roman Republic the many dissimilar nations which became its provinces, and which were held together by the wonderful Roman civil law. The Roman law was really the result of freedom and free intellectual development, carried on during several centuries under the benign influence of republican institutions. On the other hand, the common law was the natural result of the feudal or military system of the northern barbarians. The foundation, therefore, of the one is justice; the basis of the other is brute force.

THE JURY SYSTEM.

It is generally considered that the cornerstone of the Anglo-Saxon criminal jurisprudence is the system of trial by jury; and

[1] This article was originally published by the North American Review of New York City for July, 1896. The present edition has been revised and somewhat added to by its author. — EDITOR'S NOTE.

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yet it appears from recent researches that the jury system was not indigenous to the common law of England, but was borrowed from the Franks.[1] In fact, the original idea of the jury system appears to have been borrowed from the Roman law.

The advantages of this system have been much enlarged upon by different writers, both in England and America, as well as upon the continent of Europe. I do not care to criticise it, even though it seems to me, at least under existing conditions, to be open to grave objections. I will only remark that when, eight hundred years ago, England was oppressed by a tyrannical king, the successful efforts of the English barons to wrest from him the Magna Charta, which gave to England no more than was already the common right of all the other nations of Central and Western Europe, were commendable, yet the concession was such that it was justly regarded as a most important step in securing human liberty. Even so, we know that the charter then granted was repeatedly violated by each and all the subsequent kings of England, down to the accession of the Stuarts. The Magna Charta was procured from King John by the barons mainly for themselves, but it inured to the benefit of the Commons, since it secured to them the right to be tried by their peers. Now, however, that the power of the Commons has so greatly overshadowed that of the barons that the two classes are rapidly merging into one, the changed conditions do not warrant any undue laudation of the Great Charter. Certainly, in the United States, where all differences of class have disappeared since slavery was abolished, there is no reason to fear oppression of the people by those in authority, since the people themselves by their representatives are in power; as a consequence, trial by jury of one's peers has no longer the significance which it may be supposed to have had under Magna Charta. The arbitrary power of arrest and detention residing in the sovereign, and against which it was the purpose of Magna Charta to guard, has never existed in the United States, where the power of the President to order the arrest of a civilian exists only when the writ of Habeas Corpus is suspended in cases of rebellion, invasion, and other great public danger, and in extradition cases, as provided in the respective treaties.

While I should not like to express any decided convictions on this subject, I may safely say that the conditions under which the jury system was established or adopted, do not prevail at the present time, even in the country of its supposed origin; it cannot, therefore, have the importance it once had. The insufficiency of this system to punish criminals is made evident, I think, by its practical results, which have, unfortunately brought about what is commonly called lynch law, and by the fact that these in their turn have given rise to a practice which is based upon a defect in existing law, and which, therefore, comes to be, in fact, the complement of criminal proceedings under the Anglo-Saxon system. It is hardly necessary to add that lynch law is highly demoralizing, that it is open to great abuses, and that, when the victim is an innocent person, it amounts to a grave crime.

When a community is satisfied that a crime has been committed, that a particular person is the author of that crime, and that he cannot be punished under the regular proceedings of a common law trial, they often take the law into their own hands, and they administer swift justice in a manner that is often barbarous, but in the only way left to them. Where, as it sometimes happens, the victim is not the real perpetrator of the crime, the practice is indeed barbarous.[2]

[1] History of English Law before the time of Edward I, by Sir Frederick Pollock and Frederick William Maitland, Cambridge, 1895, Vol. I, page 117.

[2] As an instance of this, I will mention the case of Luis Moreno, who served in the Mexican Army, was honorably discharged and came to California, where he worked in the Coggins Mill, near Sissos. On the night of the 5th of August, 1895, George Sears, the owner of a saloon at Bailley

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In any case the demoralizing effects of lynch law are so great, and I might say, so shocking, that any system which seems to make such a law necessary as a consequence of its own defects ought to be revised, so as to put an end to that terrible practice.[1] Perhaps lynching is not only due to the imperfections of the jury system, but also to the imperfect system of procedure, that caused delays in bringing about a trial, and often to the chicane and deficient preparation of the prosecuting officer.

The jury system, as applied to criminal cases, is undoubtedly more favorable to the accused than to society.[2] That it has faults is evident from the fact that some of the States of this Union, like Maryland, for instance, have enacted statutes allowing the accused to select whether he shall be tried by jury or by a judge, and this, notwithstanding the constitutional provision on the subject. I regard that provision as the first step to undermine the jury system.[1]

Hill, was mortally wounded in an affray, and Gaspar Mierhaus, a miner who was in the adjoining room to the saloon came out to help Sears, there being no witness to that incident. Moreno and Stemler were suspected of having committed the crime and were consequently arrested. Mierhaus died of his wounds some days afterwards, and there was contradictory information as to whether he identified Moreno or not, as some said that he had, and others that he had said the assassin had a beard, Moreno having none. Before the preliminary examination took place, which had been fixed for the 26th of August, a mob attacked the jail, took out four prisoners, including Moreno, and lynched them all. When this lynching was reported in the papers, a man who would not give his name for fear of being prosecuted, addressed a letter to the San Francisco Examiner, signing it John Doe, published by that paper in its issue of November 29 of that year, in which he confessed that he was the only author of the deed, and that he had killed Sears in self defense, Moreno being thus exonerated from all participation in the crime.

[1] The extent lynching has reached in the United States is truly appalling. From data contained in a report from the Committee of the Judiciary of the House of Representatives (Number 108, 54th Congress, 1st Session), presented by Mr. Thomas Updegraff of Iowa, on January 22, 1896, containing several tables of homicides perpetrated in the United States, it appears (Table number 3) that during 1895 there were 132 legal executions and 171 lynchings out of 10,500 homicides.

[2] The report just quoted of the Committee of the Judiciary of the House of Representatives, which contains several tables, compiled by the Department of Justice, of homicides perpetrated in the United States of which cognizance was taken by the Federal judicial authorites, stating the number of indictments, convictions and acquittals, shows (Table number 2) that in the year 1892 from 29 judicial Federal districts, the Federal judicial authorities took cognizance of 112 homicides, of which 96 were indicted, 24 of the accused being convicted, 37 acquitted, and only one execution having taken place.

[1] The Bar Association of Texas had its last (1896) annual convention at Galveston, and both the speeches delivered and the resolutions adopted show very clearly the inefficiency of the criminal system of jurisprudence in that State; and his remarks apply also to the criminal jurisprudence under the common law.

Mr. F. W. Ball of Fort Worth read a paper before the Association which was most emphatic in its arraignment of the existing system. "What can I say," he asked, "when I speak of our criminal law and procedure? Can I do aught but voice the general sentiment of the people, and say that it is a stench in the nostrils of every honest and law-abiding man in Texas?" He complained that "the solicitude of the courts for the constitution and the bill of rights is such that they adjudge them to be invaded every time a red-handed murderer or a highway robber is convicted without observing all the formalities and niceties requisite under our beautifully complicated system of criminal procedure"; and he declared that the decisions of the criminal appellate tribunal in hundreds of cases, by which known and notoriously guilty persons have escaped punishment, "fully and completely demonstrate one or the other of these two propositions, namely, that our criminal law is entirely insufficient for the purpose of preventing and punishing crime, or that the courts who have delivered the opinions in these cases are utterly imbecile and ignorant."

In speaking of practice and procedure in civil cases Mr. Ball declared that proper words of denunciation failed him, for the reason that "every kind of proceeding that is obsolete, every kind of method that is expensive, every kind of device that is dilatory or open to trickery, every kind of pleading and writ that is confusing and incomprehensible, is here foregathered for the benefit of the shyster lawyer, the greedy official and the dilatory judge, and to the complete destruction of the miserable litigant." Judge Simkins showed that a large proportion of these evils would have been avoided if the Legislature had done its duty when the present appellate system was established by that body.

A striking address was delivered by Judge E. J. Simkins of Corsicana. He enunciated the central truth, so often overlooked, that "the great aim of all judicial procedure is to administer substantial justice," and he declared that, "when this result is accomplished, though errors are committed not injuriously affecting the real merits of the cause, the judgment ought to be affirmed."

Judge Simkins held that it is of still greater importance in criminal than in civil cases that the controlling question should be the guilt or innocence of the defendant of the charge preferred, since criminal judgments more immediately affect the people, and therefore excite more comment than civil, and consequently whatever reasons exist for

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THE MEXICAN JURY SYSTEM.

But the force of example, and the great credit which Anglo-Saxon institutions have attained in the world, on account of their respect for individual rights, have induced some of the American nations of Latin origin to adopt the jury system, and we have done so in Mexico. Señor Mariscal, our present Secretary of State, who lived in the United States from 1863 to 1877, as Secretary of the Legation up to 1867, and afterwards as Minister from Mexico to Washington — and who is an eminent jurist, a thorough student, and a careful observer — made a special study of the jury system in the United States, and when he went home and became Secretary of Justice under President Juarez's administration, he established, in 1869, the jury system in the Federal District of Mexico for criminal cases, changing it somewhat, so as to adapt it to the peculiar conditions of the Mexican character. He provided, for instance, that a majority of the eleven jurors composing our jury should render a verdict, while under the Anglo-Saxon system the unanimous vote of the twelve jurors is required. It was provided, besides, by the Code of Criminal Procedure for the Federal District and Territories issued in 1880, with a view to prevent the failure of justice, that if, in the opinion of the presiding judge, the verdict were clearly against the evidence, he should so report to the higher court, with a motion to set that verdict aside, and if the higher court should sustain his opinion, a new trial should be granted, unless eight jurors had concurred in the verdict, in which case it should be final and could not be set aside. These provisions were somewhat changed by the Act of June 24, 1891, which was incorporated in the new code of criminal procedure of July 6, 1891, which requires that the jury shall be composed of nine jurors, that a majority of them shall render a verdict, and the decision of the jury shall be final if given by seven votes. Even with all these alterations in the system, I have seen cases in Mexico where criminals have gone unpunished, because through the eloquence of their attorneys, the jury has been influenced in their favor.

Under the system of jurisprudence prevailing in the Federal District of Mexico all the preliminary proceedings in a criminal trial, such as the examination of the accused, the taking of testimony, etc., takes place before the judge who presides over such proceedings without a jury; when this has been completed and the case is ready to be submitted, the jury is empaneled and the evidence is read to it, as set forth in the record already formed; the prosecuting attorney then presents the charges, the defense is heard, and the witnesses of both parties are examined and cross-examined; thereupon the jury renders its verdict adjudging the accused either innocent or guilty, following substantially the practice under the common law of England and of the United States. In most of the Mexican States prevails the old Spanish system of criminal jurisprudence.

THE OLD SPANISH SYSTEM OF CRIMINAL JURISPRUDENCE.

I often hear asserted in this country that the proceedings under the Roman law are secret, and that the accused does not know what the witnesses have testified against him. This assertion is entirely incorrect, and often leads to very grave misunderstandings. One of the difficulties that the Spanish-American countries have to contend with at Washington, in cases where citizens of the United States are tried by the local judges in any of those countries, is the great difference between their criminal legislation and procedure and the system prevailing in this country.

sustaining judgments in civil cases apply with tenfold force in criminal cases.

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According to the Roman system, every criminal trial is divided into two stages; during the summary (sumario), which is the first, and the purpose of which is to ascertain the facts connected with the case, the testimony of the accused is taken down, sometimes without his knowing who may be the witnesses testifying against him, or even the crime with which he is charged. During the plenary (plenario), or second stage, all the proceedings of the summary are made public; and thereafter all the proceedings are public, the accused enjoying the same rights which are guaranteed to him by the common law. To this latter statement there may be some slight exceptions, as, for instance, the fact that bail is allowed in only a few specified cases, determined by law, and never when the accused may, upon conviction, be liable to bodily punishment. It would take more space than is allowed in an article of this character, to state the respective advantages of the two systems, and I shall, therefore, limit myself to briefly mentioning the principal differences between them.

The secret proceedings of the sumario are much criticised in the United States, it being forgotten that the English common law likewise provides a secret proceeding very similar to the sumario. Before anyone is indicted in this country, the case is heard secretly by a grand jury, a body composed of persons who, in some cases at least, are secretly designated. The grand jury listens to such testimony as is offered, or as it may deem sufficient, without permitting the accused to be present or to know what transpires; and if in their judgment there should be sufficient ground, an indictment is found; and thereafter the public trial begins before the court. It is very difficult, of course, to make any general statement which will be accurately true with respect to all of the forty-five commonwealths which compose this Union, since, as is well known, each of them has its own legislation. In some States, as in New York, a preliminary hearing may take place before a police magistrate, who has in some petty cases power to inflict punishment, release the accused, or hold him for action of the grand jury. Sometimes, however, no arrest is made until an indictment has been found by the grand jury, or in cases of misdemeanor, for trial by a court of judges if the defendant waives a jury.

So far, therefore, as a proceeding under one system may be said to correspond to a proceeding under the other, it may be said that the sumario, in countries where the Roman law prevails, corresponds practically to a grand jury indictment in Anglo-Saxon nations.

In the Latin countries testimony is taken down in writing, and, after being read to the witness, is signed by him and by the judge, in proof of the fact that his statements have been correctly recorded. That gives a degree of certainty to the correctness of the testimony which cannot be obtained by a stenographic report; and it renders it impossible for the judge or opposing counsel to put into the mouth of a witness language different from that which he has actually used. When the summary is ended, all the testimony is presented to the accused for his examination; and the right is then given him to cross-examine the witnesses who have appeared against him. The cross-examination is an old Spanish proceeding which we call "careo," and which in Spanish means that the accused is personally confronted with the witnesses in presence of the judge, for the purpose of cross-examining them. It is therefore quite incorrect to assert that, because the sumario, or first stage of the trial under the Latin system, is kept secret, therefore the accused does not know anything regarding the evidence against him; the fact being that during the second or plenary stage of the proceeding he is fully informed of all that has been done, and is given ample opportunity to

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refute it, either by presenting his own witnesses or by cross-examining such as have been presented by the other side, or called by the judge.

RIGHT OF APPEAL.

Another right guaranteed to the accused under the Mexican law, and which in its broadest sense is unknown to the common law as such, is the right of appeal; that is to say, the right in every case to have both the law and the facts reviewed by a higher court. Under the Mexican laws this right is very broad. Our laws provide that no decision made by judge or jury condemning the accused can be executed until after it has been affirmed by a higher court. Not only is the accused given the right to appeal once, and sometimes twice, from any decision against him, but it is also made the duty of the lower court to send the case with the record for review to the higher court in cases where the convicted person does not appeal. Such is the practice under the Roman and Spanish law; but in the Federal District of Mexico, where the jury system has been adopted, the case goes to the higher court only on appeal of the aggrieved party, and said appeal only affects questions of law, and not the facts as stated before the jury, which cannot be controverted.

It is true that under the common law system of criminal jurisprudence the accused or his lawyer can take exceptions to points decided by the judge during the trial, and that these exceptions may be reviewed by a higher court, but this can hardly be said to be an appeal, in the sense contemplated by the Mexican law, because the decision of the appellate court is only limited to those points which may be covered by the exceptions taken at the trial. It is true that in some States, as, for instance, New York, an appeal can now be taken which will bring before the court for review, questions of fact as well as questions of law; but in so far as this procedure has been adopted, it is a departure from the strict rules of the common law and an adoption of the principles of the Roman law, since, according to the theory of the common law, a jury can make no mistake, and its findings are therefore final.

Our Constitution of 1857 is so careful not to allow anybody to be kept in prison for any extraordinary length of time, that Article 19 specially provides that when a man shall have been arrested the judge shall hold a preliminary examination, and shall within three days from the time of his arrest decide whether there is cause to try him or whether he shall be set at liberty. If the judge shall find that there is sufficient ground for continuing the investigation, the prisoner shall be remanded; otherwise he shall be set at liberty. In the first instance the judge has to sign what is called in Spanish *auto de prision formal*, meaning an order of formal commitment. In the second place, the prisoner is set at liberty. This proceeding corresponds in a measure to the grand jury investigation under the common law. As I have already stated, in some States, like New York, a committing magistrate is authorized to examine the case as a preliminary step to the investigation of the grand jury. Where such a practice prevails, two examinations take place before the criminal charge upon which the accused is to be finally tried is definitely formulated, while under our system only one investigation is made, and even that must be completed within three days of the arrest.

The assertion, often heard, that American citizens tried in Mexico are not notified of the cause of their arrest; that they are not confronted with their accusers; and they are not allowed to appear in self-defense, is in open contradiction to the express provisions of our statutes. As a matter of fact, Article 20 of our Constitution of 1857 grants the following guarantees to the accused, in criminal cases: —

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1. That the cause of the proceeding and the name of the accuser be made known to the accused.

2. That the preliminary examination of the accused must be held within forty-eight hours from the time he is placed at the disposal of the judge.

3. That he may cross-examine the witnesses who testify against him.

4. That such information as the accused may need for the purpose of answering the indictment must be given him if it be in the record.

5. That he must be heard in his own defense either in person or by some attorney of his own selection, or by both, as he may choose; and in case he should have nobody to appear for him he will be furnished with a list of lawyers appointed for such cases and given the right to select as his attorney any one whom he may prefer.

WRIT OF HABEAS CORPUS AND AMPARO.

We have copied in our Constitution from the Anglo-Saxon system of jurisprudence the writ of habeas corpus, the great conquest of the Anglo-Saxons, which guarantees life and liberty to man, and which places under the control of the judiciary the otherwise arbitrary orders of those in authority; but we have gone considerably farther in this direction, and under the name of *amparo* have extended this guarantee so that it is not limited to the protection of personal life and liberty, but embraces all rights under the Constitution — including the right of personal property, even when such rights have been defined by judicial decisions. If, for instance, a man finds that his property, or any other of his constitutional rights, are interfered with, either by civil or military authority, or even by a judicial sentence of a Federal or State court, he may apply to the respective Federal district court having jurisdiction thereof, asking it to at once suspend the act complained of, and finally to decide the case, either in his favor or against him, the decision always coming for revision to our Supreme Court.

Some American citizens who are tried in Spanish-American countries expect that the proceedings there will be conducted in accordance with the legislation of their own country, and, when they find it otherwise, they complain bitterly, considering the Latin proceedings as inquisitorial, outrageous, and even barbarous; and complaining that they are not tried under the laws in force in this country, as if the legislation of the United States should extend to foreign countries. My experience has shown me that this is sometimes the cause of serious difficulties and misunderstandings between the United States and some of the Spanish-American republics.[1]

[1] As an instance of the kind of charges made against Mexico through the press by irresponsible parties, I will mention a case recently occurred. A telegram dated at Omaha, Neb., on Nov. 23, 1895, and published broadcast by the papers of this country, stated that Col. W. A. Paxton, of that city, had received a letter from MacStewart, an old employee of his, who was under sentence of death at Parral, Chihuahua, Mexico, for shooting a policeman who was trying to kill him for a trivial offense, and stated that Stewart desired to be placed in a court where he would be allowed to plead self-defense, which he pretended was not permitted under the Mexican law. What has already been said about the Mexican criminal jurisprudence is enough to show how entirely unfounded such a statement was.

Whenever I notice in the newspapers any complaint of this character, it is my custom to communicate the same to the Mexican Government and to request an official investigation of the case, so that I may rectify the statement, if it should prove to be incorrect, or remedy the wrong before it assumes a serious aspect, if in fact there should be any real cause for complaint. In due course I generally receive an official statement which is almost always at great variance with the complaint. In this particular case, the facts turned out to be that MacStewart abused a policeman who was unarmed, and following him to the post-office, at Parral, fired upon him without the slightest cause, killing him instantly; that, not satisfied with this, he killed the policeman's horse, and then fired upon the Chief of Police, who arrested him. It further appeared that this was his second offense of this character, as he had killed before, in Mexico, a United States citizen named Rogers. In the case of Rogers, MacStewart was acquitted, and upon the trial for the murder of the policeman he was allowed to plead self-defense, but failed utterly to establish it, as all the witnesses examined, including an American citizen by the name of Davis, a friend of MacStewart, testified that there had been no provocation on the part of the policeman, and that the accused had committed a wilful and wanton murder.

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LENGTH OF TRIALS UNDER BOTH SYSTEMS.

I often hear the complaint, too, that under the Roman system the trial proceeds very slowly, and asserted that criminal trials in the United States terminate more speedily. I am not prepared to say under which of the two systems of criminal procedure the trial is sooner brought to an end. When the trial actually begins it may take a shorter time in the United States, because once begun, it cannot be interrupted. It often happens, however, that a long time elapses before a case is brought to trial; and this time is longer when a new trial is granted. It should be borne in mind that most of the courts in this country hold sessions but for a few weeks or months at a time, and that only during these sessions do they hear cases. In Latin-American countries, on the other hand, the courts are open and working all the year round. Moreover, under the common law system, the whole of the trial takes place before the jury, so that the exclusive attention of the court is necessarily devoted to that case. Only one case, therefore, can be tried at a time. In Latin-American countries a judge may try several cases concurrently, because, even where the jury system has been adopted, as it has in Mexico, a great portion of the proceedings takes place before the judge without the jury. As a consequence of this, trials in this country, by reason of the crowded condition of the dockets, are often delayed for months at a time, while in the Latin countries trials begin as soon as the prisoners are arrested.

MEXICAN PRISONS.

I often hear in this country great complaints made against the Mexican prisons, which are said to be uncomfortable, and sometimes considered filthy. It is a fact that some prisons in Mexico are in a very poor condition; but that is due to the limited resources of the country. A poor country cannot afford to build magnificent prisons; yet notwithstanding that we have to contend with want of means, the States of Jalisco and Puebla have built spacious and comfortable penitentiaries at Guadalajara and Puebla, their respective capitals, and the State of Guanajuato at the city of Salamanca. Other States, as San Luis Potosi, are constructing new penitentiaries, and the Federal Government is concluding the erection of one at the City of Mexico which will favorably compare with any in this country.

Prisons cannot be as comfortable as palaces or hotels, and even in this country, with all its wealth, advancement, and prosperity, prisons are sometimes very objectionable.[1] If we had two sets of prisons in Mexico, one for Mexican citizens and the other for foreigners, and if the former were more comfortable than the latter, the citizens of this country would have reason to complain; but if we treat them on an equal footing with our own citizens, and if we give them the best we can, — that is, if we keep them in the same building, provide the same food, and extend to them the same conditions that we do our

[1] The New York Herald of the 29th of October, 1895, published the following statement, made to the Board of Estimate by Miss Rosa Butler of the State Charities Waif Association, about the deplorable condition of Blackwell's Island Almshouse: —

"Among these evils are the terrible overcrowding at the almshouse, where, even during the past summer, more than three hundred persons slept on beds made on the floor; unsuitability of the almshouse building, 1,500 occupying buildings which have neither hot nor cold water, no bath-rooms, no lavatories; the wretchedly inadequate nursing at the almshouse hospitals, there being but one untrained and incompetent nurse for every forty patients; the unskilled and inadequate nursing on Randall's Island, where of 160 foundlings cared for in 1894, 119 died, and of 384 other infants, not foundlings, cared for without their mothers, 296 died; the dilapidated condition of the City Hospital, to which no repairs have been made for several years; the employment of workhouse prisoners in hospital kitchens; placing the erysipelas wards in the dock house, which is old, noisy and infested with vermin; the lack of proper facilities of dealing with casual lodgers, and so forth."

If prisons that are in the heart of the City of New York, the largest and wealthiest of this country, and under its immediate supervisions, are in that state, the bad condition of some of the Mexican prisons is certainly nothing extraordinary.

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own citizens, I fail to see how there can be any cause for complaint.

It should not be difficult to see which system of criminal jurisprudence is, on the whole, best calculated to do justice by ascertaining the real facts of the case, whether by a judge of long experience and proficiency in his profession, with no personal interest in the cases tried before him, or by a jury composed of men who have no experience in criminal jurisprudence. If the judge may sometimes be derelict in his duties, so also may the jury occasionally be controlled by their emotions. If the judge fails to do his duty, his failure will be corrected by an appellate court, as all cases must be reviewed upon appeal. For the improper verdict of a jury there is often no adequate remedy. The Anglo-Saxon criminal jurisprudence is founded upon the principle that it is better to let one hundred criminals go unpunished rather than to inflict punishment upon a single innocent person. While the Latin system accepts that humanitarian principle, it is nevertheless better calculated to prevent the escape of a criminal unpunished.

SUMMARY PROCEEDINGS UNDER THE MEXICAN CONSTITUTION.

There is a provision in our Constitution which is often misunderstood, and which has given rise to the idea that we sometimes administer justice in too speedy a manner and with a complete disregard of the forms of law established for the protection of human life. Our Constitution commences with a declaration of the rights of man, taken in a great measure from the declaration of the French National Assembly during the Revolution, which in its turn was in a great measure taken from the Declaration of Independence of the United States. These rights secure the most ample liberty and immunity both to the person and property of the inhabitants of the country.

While our Constitution was being formed, however, it was contended that, on extraordinary occasions, as in case of war or other serious danger to society, the rights guaranteed by the Constitution might stand very much in the way of inflicting needed and speedy punishment. To obviate this, the Constitution provides, in Article XXIX, that the rights of man, as guaranteed by that instrument, excepting such as secure his life, may be suspended for a short time in certain emergencies, provided that suspension be upon the President's initiative, and with the consent of Congress; and provided, further, that the suspension shall be applicable to a class; that it shall not apply to an individual; and that it shall be for a brief period. If it should be found, for instance, that the crime of derailing railway cars, either for the purpose of robbing them or for any other unlawful end, should become frequent, and if it should be found that the emergency called for extraordinary measures, the President would ask Congress for the suspension of the personal guarantees of this class of criminals for a limited period, say six months; and if Congress should sanction this suspension, a summary criminal proceeding would be established, for the purpose of inflicting punishment without delay, thereby deterring others who might be disposed to commit the same crime. At the end of the period fixed public confidence would have been restored, and there being no further need for the unusual measures adopted, the suspension of constitutional guarantees would come to an end. It will be seen that our Constitution provides a speedy way for punishing criminals in extraordinary cases, without the unfortunate need which the condition of things has sometimes made necessary in this country — especially in California in former years — of establishing a committee of public safety to preserve order, a proceeding which meant that the people took the law into their own hands, acting without regard to the usual legal forms, and oftentimes in a manner closely resembling lynch law.

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THE COMMON LAW AND ROMAN CIVIL JURISPRUDENCE.

When we pass from criminal to civil jurisprudence, the superiority of the Roman law is incontrovertible, and a few remarks on that subject will be pertinent in this case.[1]

One of the most conclusive proofs that the Roman civil law is not inferior to the English common law is that England, the very country where it had its birth, was obliged to establish two systems of civil jurisprudence, one the common law proper, which was administered through the older and ordinary courts, and the other the Roman law, administered through the chancery or equity courts. Law is supposed to be the perfection of justice and the best expression of human reason; it should, then, embrace not only equity, but the very essence of justice itself. If, therefore, a particular law or system of laws fails to include equity, that law or system cannot be perfection. The very idea that equity can be a thing outside and different from law seems contradictory and absurd.

Although the chancery or equity courts were in the beginning established in England for the purpose of trying such cases as could not be reached by the common law, or in which the processes of the common law courts afforded no adequate remedy, the Roman law came finally to be in reality the law which was intended to fill the gaps and remedy the defects of the common law. The common law courts were always very jealous of the equity courts; but after the decision of King James I, in the controversy between Sir Edward Coke, on the one side, representing the common law courts, and Lord Ellesmere, the Lord Chancellor, and Lord Bacon, on the other, representing the equity, or Roman law courts, it was established that a man might have recourse to a court of equity in many cases after his rights had been adjudicated at the common law courts. The establishment of this principle was equivalent in fact, though not in form, to giving an appeal from the courts of common law to the courts of equity, thus recognizing the superiority of the Roman over the common law system. It is true that the equity courts could not reverse the decision of the common law courts, but if, in the trial of the same case an equity court reached an opposite or different conclusion, the judgment of the common law court could not be executed, and became therefore, in fact, nullified.

I am well aware that a common law lawyer will not admit that the equity courts can reverse the judgment of the common law courts, because legally and technically that cannot be done; but as a matter of fact such is the practical consequence of the system as it now exists. If a common law

[1] In an admirable address that Judge Martin F. Morris, Associate Justice of the Court of Appeals of the District of Columbia and Professor of Constitutional and International law, Admiralty, and Comparative Jurisprudence, in the Law School of Georgetown University, District of Columbia, delivered before the graduating class in 1891, he said, referring to the subject of the common law and the Roman law (pages 30 and 31), the following: —

"But, however it be in criminal cases, I have no hesitation whatever, after a long experience of it, to assert that, as a mode of determination of civil causes and private controversies, the genius of man has never yet devised anything more absurd than the organized ignorance and besotted prejudices of twelve men in a jury box. The man who has a good case is always desirous to have it taken away from the determination of a jury, and to submit it to the arbitrament of a court alone — to the arbitrament, in fact, of any one other than the twelve men in a jury box; while the dishonest litigant, the unprincipled lawyer, and the speculating knave, are ever loud in their demands for trial by jury; for only upon the prejudices, the passions, the ignorance, or the corruption of juries can they base their hopes of success. This is the experience of every man who has had to do with courts of law, and it speaks volumes to the discredit of the system. Then the divided responsibility of court and jury, the necessity of immediate decision by the former of questions of law upon which appellate tribunals often deliberate for weeks and months without coming to a satisfactory conclusion, the consequent necessity of repeated trials before a final decision is reached — all contribute to render the system exceedingly unsatisfactory in its methods, no less than its results.

"We think we are fully justified in the assertion that there is no one feature of our jurisprudence that tends more in practice to a denial of justice than the system of trial by jury. It may, perhaps, have done well enough in a barbarous age, when judges may not have been more intelligent than juries, and may have been, in fact, the tools and minions of despotic power; but in this age and country it is nothing more than a relic of feudal barbarism."

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court, for instance, decides a case against the defendant, and if after that decision the defendant finds proofs to establish his contentions, he may still go to the equity court, present his proofs and ask that the plaintiff be enjoined from executing the judgment against him; and in such cases the equity court has jurisdiction to grant such an application. In a case like the one cited the equity court does not pretend technically to revise or reverse the judgment of the common law court; but by granting the injunction against its execution it practically effects its reversal; and such a system therefore actually produces the same result as though the equity court were a court of appeals.[1]

The American people, with their practical common sense, have remedied a great many of the defects of the common law practice in civil cases, changing it gradually to such an extent that now it can hardly be said that the English common law system, as expounded by Blackstone, is in force in the United States. It is still called the common law, but for all practical purposes it is almost superseded by the Roman law.

Even as regards the jury system, and notwithstanding the fact that this has been considered the corner-stone of common law criminal jurisprudence, some States of this country have, as I understand, changed the foundation of that system by not requiring a unanimous verdict for the conviction of the accused.

The very country which established and for years maintained the common law has practically superseded it by the Roman jurisprudence. In one of the acts of the British Parliament passed in the years of 1873, 1874 and 1875 the whole system of English Courts of Justice was remodeled

1 The following letters explain themselves and make this subject more clear: —

CHICAGO, July 17, 1896.

SEÑOR DON MATIAS ROMERO,

Minister of the Republic of Mexico, Washington, D.C.

Dear Sir. — I have read with deep interest your valuable article in the current number of the North American Review, contrasting the systems of criminal jurisprudence in force in your own country and in this, and am happy to say that I have gained from it much information which I had not before possessed, and of which very, very few of our American lawyers, and publicists even, have any adequate knowledge, and I desire, therefore, to sincerely thank you.

May I, however, take the liberty of correcting a misstatement contained in the paragraph commencing at the bottom of page 88? It would seem that you regard the power of a court of equity to restrain the enforcement of a common law judgment as equivalent to the power of a court of appeal. As a matter of fact, it is not so. A court of equity has no power whatever, under our system of jurisprudence, to interfere where an appeal would be the proper remedy. But where there has been fraud, or where it appears that judgment has been entered, when in fact, no summons has been served on defendant, although the record recites that summons has been served, a court of equity may act, provided the question could not have been raised in the common law suit, by reason of want of knowledge on the part of the defendant, until after the expiration of the term of court, or some similar reason. In addition, the defendant who seeks the aid of a court of equity in such case must show that the plaintiff had no cause of action; but, if an appeal can be taken, an appeal must be taken, or defendant cannot complain.

The error into which you have inadvertently fallen is, perhaps, a natural one, and does not detract in the least from the value of your article, for which I again express my appreciation.

I trust you will not consider my remarks as impertinent, even though your attention has already been called to your error. I am, respectfully, your obedient servant,

EDWIN I. FELSENTHAL, *Attorney-at-Law.*

WASHINGTON, Aug. 7, 1896.

MR. EDWIN I. FELSENTHAL, *Attorney-at-Law, Chicago, Ill.*

Dear Sir. — In answer to your kind and appreciative note concerning my article in the North American Review contrasting the criminal systems of the Roman and the English law, I have to say that I am entirely aware that, under the English or Anglo-American system of jurisprudence, there is technically no appeal from the courts of common law to the courts of equity, but that the concurrent jurisdiction of courts of common law and equity, and the power of courts of equity in many cases to annul or restrain the judgments of courts of law, had the practical effect of an appeal from the latter to the former. Probably I did not use the term appeal in the strict technical sense which it has in your jurisprudence, but rather in the common sense. However, your great commentator, Sir Edward Coke, in his famous controversy with Lord Bacon, concerning the jurisdiction of equity, would seem to have regarded the exercise of the jurisdiction assumed by equity as an attempt to give an appeal to the courts of chancery from the courts of common law.

Thanking you for the kind expressions concerning my article contained in your letter,

I am very truly yours, M. ROMERO.

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after the systems prevailing in countries which had adopted the Roman law, and it was provided that when the rules of common law and those of equity come into conflict, the latter shall prevail. Such a provision is almost equivalent to repealing the common law itself.

LITERAL APPLICATION OF THE LAW.

The literal application of the common law is, I think, another of its disadvantages. A common law judge is bound to apply the law in its literal meaning, even in cases when doing that may involve a denial of justice, while a Roman law judge applies the letter of the law to the case where it fits exactly, and has some discretion to be guided by the meaning and object of its statute, rather than by its literal words, when its words conflict with justice or equity.

A result of the literal application of the statute, and of the strict observance of the formalities established by the statute, is the reversal of judgments upon the ground of purely technical errors, which in some states, like Texas, is carried to an excess, very difficult to understand by a Roman law lawyer.[1]

PRECEDENTS AND THE COMMON LAW.

American lawyers in arguing cases, and judges in deciding them according to the practice under the common law system, are controlled almost entirely by precedents, and while considerations of justice and equity are sometimes indulged in, they have legally but little weight. Such a system is very unsatisfactory, because each case being different from the other, the decisions in the one cannot be made to exactly fit the other. Moreover, it entails a herculean task upon the lawyers and judges, making it obligatory for them to search for precedents not only in the courts of their own country, but even in these of England. With the justices of the Supreme Court of the United States, this work is still more arduous, since they must examine and be familiar not only with all cases decided by the various Federal courts, but by all the courts of the forty-five different commonwealths which form this Union, each with its own distinct legislation, and with the Roman law also, as the State of Louisiana has adopted it; entailing besides the need of keeping a very large library. Doubtless, no public functionaries under the Federal Government have more arduous work imposed upon them. The day is not long enough to permit its completion, and I have personally known more than one who has broken down under that tremendous strain.

This condition of things shows that the common law is still in its rude and primary state, viz.: setting precedents. After sufficient precedents have been collected to form a code, they should be codified if the United States shall not previously have accepted in its entirety the Roman law. The Roman law had to pass through these dif-

[1] During the last meeting of the Bar Association of Texas from which I have already quoted, it was mentioned that a robbery was committed in Groveton, the only town of that name in the State of Texas, and the county seat of Trinity County in said State. The robber was detected, tried and convicted. There was no question either as to his guilt or as to the fairness of the proceedings against him in the court where he was arraigned. The case was carried up on exceptions to the Court of Appeals, and that tribunal set aside the verdict on the ground that the indictment only specified the crime as having been committed in the town of Groveton, State of Texas, instead of the town of Groveton, County of Trinity, State of Texas. It seems that the Court of Appeals is required by the Statutes to rule in that way. When the present appellate system was established by the Legislature of Texas, as originally submitted, the measure contained an article providing that, "if the court of civil appeals shall be of the opinion, in considering all the facts of a case, that the trial court failed to do substantial justice, it shall reverse the judgment, but it shall affirm the case if substantial justice has been done, though there be errors committed not affecting the merit of the case." This article provoked more debate in the Senate than any other in the bill, and it was passed by a large majority, but in the House it was stricken out without debate, and apparently without any apprehension of its importance.

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ferent stages, and it had passed them all, when it assumed the shape in which it is at present. It has been fully digested, and its principles formulated into simple rules, while the common law is yet in process of development, still passing through the primary stages.

CONCLUSION.

I hope that these few observations, which have been written without preparation, will assist in dispelling the misapprehension which exists in this country regarding the criminal jurisprudence of Spanish-American nations, and in that way contribute to the better understanding between the United States and her sister Republics. A careful study of the Roman system of jurisprudence by Anglo-Saxon judges, lawyers and statesmen has resulted in the adoption of many features of the Roman law, and a careful and comparative study of both systems would very likely lead to a conclusion in favor of an eclectic one which would combine the best features of each.

THE RIGHT OF SANCTUARY.

By George H. Westley.

THE institution of sanctuary, which in various phases seems to have existed from earliest times almost down to our own century, offers to the student of ancient and mediaeval law a most interesting study. It is said that the originator of this institution was Nimrod, who, according to Scripture, was the first monarch and a " mighty hunter before the Lord." Nimrod, on the death of his eldest son, erected a golden statue of him in his palace, and ordained that criminals of all sorts, even murderers, who fled to the statue, should go free from the penalty of their crimes.

We have it on more satisfactory authority, however, that the institution of sanctuary was founded by Moses, who, as every Bible reader is aware, appointed six cities of refuge whereunto the unfortunate slayer of his fellowman might flee from the threatening sword of the avenger of blood. The purpose of the great lawgiver was a wise and humane one. It was by no means to subvert justice or lessen the effectiveness of the laws. The murderer was assuredly to die, but " if a man lie not in wait, but God deliver him (that is smitten) into his hand, then will I appoint a place whither he shall flee." In other words it was intended that the man who by misfortune or accident should kill his neighbor, should have a place of refuge, where he could await cool and impartial trial, secure from the vengeance of some hot-headed, unreasoning relative of the person he had slain.

When the refugee entered either of the six places of safety, certain conditions were imposed upon him. One was that he must "declare his cause in the ears of the elders of that city," and another, that he should not leave the city of refuge till the death of the high priest, at which time grief for the public loss was supposed to swallow up all private resentments.

In due time his case came up, and he was tried according to the law laid down by Moses, the avenger of blood being his prosecutor. If the verdict was murder, the refugee was given up, even though he had clung to the sacred altar. If manslaughter, he was allowed to remain as a prisoner at large till the death of the high priest, after which he could safely return to his home and family. If, however, he ventured out

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before that time, he might be slain with impunity.

Plutarch notes the institution of sanctuary among the ancient Greeks. He tells us that the oratory of Theseus was a place of refuge for servants and persons of mean condition, who fled from the powerful and oppressive. But although it started with the beneficent intention of protecting the weak and unfortunate, it soon fell into abuse, for as Dr. Pegge tells us on the authority of Tacitus, "they soon confounded and perverted everything, making no difference between casualties and premeditated acts of violence, but opening their asyla indiscriminately to refugees of all kinds. They seem to have had no thought or intention of bringing notorious criminals to trial, but suffered them to continue in the franchise quite easy and unmolested as long as they pleased; by which means they made their deities, from whom their holy places, temples, altars, and statues derived all their sanctity, the direct patrons and abettors of the most shocking and most abominable vices and crimes."

Among the Greeks the right of sanctuary was not steadily inviolable. Alexander respected it, so that a slave of his who had taken refuge in a temple remained there unmolested; but other rulers did not scruple to kill their victims at the very altar. Still others compromised on the matter by starving the refugees out, or otherwise compelling them to come forth from the sacred precincts.

From Greece the institution spread to Rome, retaining unfortunately its worst features. As Plutarch declares, the heathen priests would neither "deliver up the slave to his master, the debtor to his creditor, nor the murderer to the magistrate." Nor was this state of affairs improved upon the accession of the Christian emperors. The sanctuary privileges of the heathen temples were transferred to the Christian churches, but not emended with that proper distinction between the unfortunate and the vicious which characterized the method of the great Jewish lawgiver. To quote Dr. Pegge once more, "the churches became so many dens of thieves, traitors, murderers, parricides, in a word, of all kinds of villains."

With the further history of sanctuary in Italy we need not concern ourselves. Suffice it to say that it had a fluctuating existence under the various rulers, and that it was still extant in the eighteenth century, when Tobias Smollett wrote of seeing a man, who three days before had murdered his wife in the last month of her pregnancy, taking the air with great composure and serenity on the steps of the church at Florence. "Nothing is more common," he continued, "than to see the most execrable villains diverting themselves in the cloisters of some convents at Rome," where they had taken sanctuary.

Coming now to England, we find that the right of sanctuary prevailed in the seventh century. Its existence there previous to that time is doubtful. One of the laws of Ina, King of the West Saxons, dated 693, ordained that if a person convicted of a capital offense fled to a church, his life should be spared; and also that if any one who deserved to be flogged sought refuge there, the stripes should be withheld from him. It was clearly added, however, that the fugitive should make every recompense in his power for his crime.

During the succeeding centuries, the privilege underwent many modifications. In the ninth century, Alfred the Great allowed the protection of the church to the culprit for three days only, so as to enable him to provide for his safety. If this brief sanctuary was violated by the inflicting of blows, wounds, or bonds upon the refugee, the violator was compelled to pay one hundred and twenty shillings for the offense — in those days no mean sum.

A law concerning sanctuary in the time of William the Conqueror, ordained that whosoever took a person from an abbey was

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to forfeit one hundred shillings and restore the person; if from a parish church, twenty shillings; and if from a chapel, ten shillings. It was also ordained that sanctuary men might go thirty paces from the church, and forty if a cathedral.

The sanctuary bounds around some churches were quite extensive. The privilege at Beverley covered a radius of a mile, taking St. John's cathedral as a center. At Hexham there were four stone crosses inscribed "Sanctuarium," set up at a certain distance from the church in the four roads leading thither, and if a malefactor flying for refuge to that church was captured by his pursuer within the crosses, the latter was liable to a fine of sixteen pounds; if within the town, thirty-two pounds; if within the walls of the churchyard, forty-eight pounds; if within the church, ninety-six pounds; if within the doors of the quire, one hundred and forty-four pounds, besides penance in case of sacrilege; but if he presumed to take the fugitive out of the stone chair near the altar, called the Fridstol, that is, the Chair of Peace, or from among the holy relics behind the altar, the offense was not redeemable with any sum, but was then become *fine emendatione boteles*, and was followed by a dreadful excommunication, besides the penalty of the civil law for presumptuous misdemeanor.

By the laws of Edward the Confessor, if a person, in flying to refuge, should enter the house or courtyard of a priest, he was to be as secure as if he had reached the church, provided said house stood upon church property. Still broader in scope was the sanctuary allowed by King Ethelred, A. D. 1008. In his constitutions it was directed that any one who fled to the King, archbishop, or a nobleman, should be safe for nine days. Or if he had recourse to his bishop, to an alderman, or to a schoolmaster, either of these might give him seven days' refuge.

Those who took sanctuary in the churches were to be supplied not only with food and habitation, but also with clothes. The Welsh were even more liberal. They allowed murderers, traitors, and other criminals refuge not only for themselves but also for their servants and cattle, assigning for the last considerable tracts of pasture land. In some of the principal churches, the cattle sanctuary extended "as far as the creatures could range in a day and return at night."

Looking now into the method observed by those who sought sanctuary, we find that at Durham and Beverley it was as follows. The fugitive came to the north door and knocked for admission. There were two chambers above this door where slept two men ready to admit such fugitives at any hour of the night. As soon as he was admitted the galilee bell was immediately tolled, to give notice that some one had taken sanctuary. The notice of this custom occurs constantly in the register of the sanctuary at Durham until the year 1503.

We gain from the Harleian Manuscripts the following account of the oath by the bailiff of the town, whose place it was to enquire of the refugee "what man he killed and wher with and both ther names; and then gar him lay his hand upon the book, saying on this wyse: 'Sir, take hede on your oth. Ye shal be trew and feythful to my Lord Archbishop of York, lord of this towne; to the Provost of the same; to the Chanons of this Church and all other ministers thereof. Also ye shal bere gude hert to the Baillie and XII Governors of this towne, to al burges and comyners of the same. Also ye shall bere no poynted wapen, dagger, knyfe, ne none other wapen agenst the Kyng's pece. And ye shal be redy at all your power if ther be any debate or stryfe or oder sothan case of fyre within the towne, to help to surcess it — so help you God and thies holy Evangelistes.' And then gar hym kysse the book." The bailiff's fee on this occasion was two shillings and four pence, and for inscribing the fugitive's

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name in the Sanctuary Register, the clerk of the court received four pence.

Concerning this register, most of the entries are in Latin; a few however are in English, and here is a sample. "M. that John Sprot of Barton upon Umber in the counte of Lyncoln, jintleman com to Beverlay the ferst day of October the vij yer of the raen of Keng Herre vij, and asked the lybertes of Sant John of Beverlay for the dethe of John Welton, husbandman of the sam toon, and aknawleg hym selff to be at the kyllyng of the saym John wt a dager the XV day of August."

At one period the custom prevailed of compelling refugees, if forty days passed without their coming to terms with those they had injured, to abjure the country, and to swear that they would not return without the king's license. The following is an example of the oath of confession and abjuration: "This hear thou, Sir Coroner, that I, M. of H., am a robber of sheep or of any other beast, or a murderer of one or of mo, and a felon of our lord, the King of England; and because I have done many such evils or robberies in his land, I do abjure the land of our Lord Edward, King of England, and I shall haste me towards the port of such a place which thou hast given me; and that I shall not go out of the highway; and if I do, I will that I be taken as a robber and a felon of our lord the King; and that at such a place I will diligently seek for passage, and that I will tarry there but one flood and ebb, if I can have passage; and unless I can have it in such a place, I will go every day into the sea up to my knees, assaying to pass over; and unless I can do this within forty days I will put myself again into the church as a robber and a felon of our Lord the King; so God me help and His holy judgment."

It seems that this abjuration act sent too many skilled artisans out of the country, so Henry VIII substituted another act therefor, which ordained that the criminal, instead of abjuring the realm, should abjure his liberty to go free therein, and should abide for life as a sanctuary person abjured, in some refuge appointed by the coroner. He was also to be branded on the thumb with an A, that he might be known among the King's subjects to have abjured.

As among the Greek rulers, so among the kings of England, the institution of sanctuary was held in fluctuating regard. Some looked upon it as an inviolable right of the church, others maintained that it was a right subservient to law. Notorious among the latter was Henry II, who, according to Knyghton, snatched delinquents from the very altar without scruple.

One of the most flagrant breaches of the ancient privilege occurred in 1378. Sir John Shackle and Sir Robert Haule, having escaped from the Tower, took refuge in Westminster. They were pursued by Boxhall, constable of the Tower, and Sir Ralph Ferrers with fifty armed men. Mass was being celebrated when the pursuers came up, but regardless of time, place, or the rights of sanctuary, they burst into the church after the fugitives. Shackle escaped, but Haule was intercepted. He fled round the choir twice, his enemies hacking at him as he ran, until, pierced with twelve wounds, he sank dead at the prior's stall.

Sir Robert was regarded as a martyr to the desecrated rights of the abbey, and he was honored with a burial within its walls. He was the first to be laid in the south transept, and was followed a few years later by Chaucer, who was interred at his feet. The dastardly deed of Boxhall and Ferrers created such a sensation that the abbey was shut up for four months, and Parliament was suspended lest its assembly should be polluted by sitting within the desecrated precincts.

Among the refugees to Westminster were several representatives of royalty. Queen Elizabeth, widow of Edward IV, took sanctuary there with her son, against the malice

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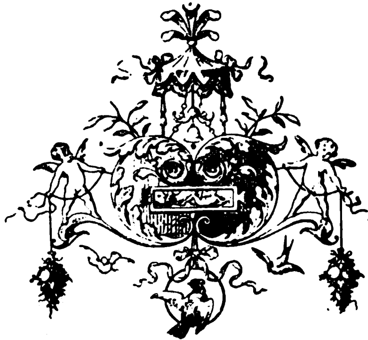
of Richard III. Owen Tudor, father of Henry VII, also took refuge in this abbey.

With the passing of feudal times, with the coming of our modern civilization, our age of reason, the necessity of the institution of sanctuary grew less and less apparent. Under Henry VIII the privilege began to be restricted, not only in the number of sanctuary churches, but also in the crimes for which these churches could afford protection. The murderer, the house-breaker, the highway robber, and those guilty of rape or arson, could no longer find a refuge within the sacred walls. This was the beginning of the end. By statute of James I the old usage of sanctuary was totally abolished.

But an institution which has flourished for centuries does not die without a struggle. Long after its legal abolishment, it existed in such fact that the old refuges were still the haunts of men whom fear of the law made desperate, and, as an old writer puts it, "it was seldom that the officers of justice ventured to execute a warrant or serve a summons among 'the bravoes of Alsatia,' the birds of St. Martin's nest, the 'freemen' of the Borough, or the boys of 'Westminster Knoll.'"



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THE VICE-PRESIDENT: WHAT TO DO WITH HIM.

By Hon. Walter Clark.

In the beginning it was contemplated by our Constitution-makers that while the successful candidate should be President, his chief rival should be the Vice-President. Accordingly when John Adams became President, Thomas Jefferson was chosen Vice-President. At the next election when Thomas Jefferson was chosen, Aaron Burr, who was not in contemplation at the polls for the chief place, jeopardized the choice of Jefferson, and the danger of a repetition of this state of things caused a constitutional amendment to avert it. Under the practical workings of the Constitution we have the present anomalous condition, that the Vice-Presidency is an office without power and almost without duties, and consequently almost without importance. His sole duty, that of presiding over a Senate in which he has no voice and, save in case of a tie, no vote, can be, and often for long periods is, discharged by some senator who is elected as President *pro tem*. The Vice-President is not vested with the power of appointing the committees, since, unlike the Speaker of the House of Representatives, he is not chosen by the body over which he presides, and not infrequently is of a different political party from the majority of the Senate.

Thus being without power and practically without duties, the Vice-Presidency offers few inducements to an able, ambitious man, and the nomination has been often refused. This has in very many instances, though not always, thrown the nomination as a compliment to some man who would not by the nominating convention be considered for a moment for the Presidency. Yet the Vice-President has the terrible potentiality of succeeding to the Presidency in the event of a vacancy. This condition has brought about some most inconvenient results. In 1840 John Tyler was nominated to conciliate the minority of the Whig party who differed widely on some material points from the great bulk of the party. The death of President Harrison, after a short month in office, robbed the Whigs of the fruits of their victory and brought catastrophe upon them and a revolution in the policy of the administration. In 1848, after the nomination of Gen. Taylor, Mr. Webster declined the Vice-Presidency as beneath him, and thus lost his last chance of filling his life-long ambition, for a few months later Mr. Fillmore became President, — a most excellent man, but one who would never have been thought of for the first place. Had President Lincoln died during his first term, it may be seriously doubted if Mr. Hamlin would have been satisfactory to his party or the country, and it is very certain that Andrew Johnson was not.

It is not necessary to prolong this review. While there have been a few Vice-Presidents who were possible nominees for the Presidency, the rule has been otherwise. As out of nineteen presidents so far elected, four have fallen in office, the ratio of succession for the Vice-Presidency has been more than one in five, in fact over twenty-one per cent. This opens up a serious danger, and some plan should be devised to make the Vice-Presidency more attractive to men of the first order, by adding to its dignity and powers.

Among the plans discussed, that of giving the Vice-President a voice and vote in the Senate would require a constitutional amendment. Nor can it be expected that the Senate will amend its rules to confer on the Vice-President the important power of ap-

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pointing committees which is possessed by the presiding officer of the House of Representatives, seeing, as already stated, the Vice-President is not chosen by the Senate and not infrequently belongs to a different political party from a majority of that body.

There is, however, an opportunity to make the Vice-President something more than the mere moderator, without voice or vote, of the upper House and the fifth wheel of the coach. The subject of Inter-State Commerce and the regulation of the rates and conduct of inter-state railroads and canals is one of growing importance, and is of sufficient interest to the Union at large to justify the selection by the people of the chief officer to supervise that immense business. The Department of "Inter-State Commerce" can be created by statute, without the necessity of a constitutional amendment, to which department shall be assigned as Bureaux, the Inter-State Commerce Commission, the Pacific Railroads, the Nicaragua Canal and collateral matters. The same statute can assign to the Vice-President, not as a separate office, but ex-officio, the duty of Secretary of Inter-State Commerce with the chief seat in the Cabinet and the right of presiding at all Cabinet meetings in the absence of the President. The importance of the duties thus devolved upon him (which, however, would not interfere with his brief tour of duty as presiding officer of the Senate for a few hours daily during the session of Congress) would make him in importance to the public only second to the President, and would always secure a nominee of sufficient prominence and ability, to be the equal in every respect of the Presidential nominee. Furthermore, the President's salary has been raised to $50,000 with a furnished residence, besides the payment of all expenses, which makes his real cost to the nation near a quarter of a million per annum, while the salary of the Vice-President has remained at the sum fixed one hundred years ago of $8,000, without residence or any appointing power, beyond a private secretary which is possessed now by every member of each House of Congress. The gulf fixed between the first and second officer of the government is too great. The expenses lavished on the President can be most materially curtailed, while if the Vice-President is vested ex-officio with the supervision of the Inter-State Commerce of the country, it will be necessary that he, as well as the President, should reside at the capital, and he should be furnished with a public residence and his salary augmented out of a portion of the sums which can be curtailed from the annual appropriations voted for the attendance upon the President.

By a measure of this kind the Vice-President can be made really useful and an integral part of the government, second only to the President in importance, and it would justify an appropriate salary. This will always secure the nomination as Vice-President of men of the same shade of political opinion as the President and of like prominence and ability. Should there be a vacancy in the office of Vice-President by his promotion, death, removal or resignation, the statute should in that event confer upon the President the power to appoint a Secretary of Inter-State Commerce *pro tem.*, subject to confirmation by the Senate, like other secretaries, but possessing the premiership of the Cabinet, with the right of presiding at Cabinet meetings in the absence of the President and of succeeding to the Presidential office upon the death of the President in priority to the Secretary of State and others in the order now presented by law.

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The Lawyer's Easy Chair.

.·. .·. .·. .·. .·. BY IRVING BROWNE. .·. .·. .·. .·. .·.

CURRENT TOPICS.

QUIBBLES.—That was an interesting article under this head in a recent number of this magazine. The Chairman in former days cherished a plan of writing a chapter or an essay on "Evasions of Law," which has been forgotten with many other good designs. Our contributor might have referred to the game of ten-pins. Why ten-pins? It was originally played with nine, and known as nine-pins, but the legislatures prohibited the vicious game of nine-pins, and the Yankees added a pin. One or two interesting quibbles have come to this Chair through the law journals. One of them illustrates the small estimation in which dogs are held. In West Virginia, where it is not larceny to take a dog, a dog-taker was indicted for stealing the chain to which the dog was fastened; the defendant pleaded guilty, and was sentenced to one hundred seconds in jail. In States where it is not larceny to abstract a promissory note, it may be petty larceny to abstract the paper on which it is written. That was a very serious quibble by which the New Hampshire court, after a defendant had been acquitted on a charge of murder as principal, indicted, convicted and hanged him on a charge of being accessory before the fact. In the recent Shea murder case in Troy, N. Y., McGough having been indicted for the same murder and acquitted, but having been convicted and imprisoned for another assault, confessed that he really did the fatal deed, and counsel moved for a new trial for Shea on this ground. Fifteen disinterested persons having sworn that they saw Shea do it, the Court refused the motion, and Shea was executed. So that ingenious quibble did not avail. But the most ingenious device to defeat justice that was ever heard of was invented in Wisconsin, in the case of Dozkowski, who is imprisoned at Green, on a charge of having murdered his wife. His counsel have brought an action for him against his wife for divorce on the ground of desertion on the very day of the murder. Process has been returned "not found," and now the action will be tried as in case of default. Counsel claim that if the divorce shall be granted, it must be on the assumption that she was alive at the time in question, and the husband, consequently, cannot be convicted of murdering her. In other words, that a plea of *res judicata*, founded on a judgment in a civil action, will avail on a criminal charge. That plea will not hold water. The parties are not the same; they are not privies, nor is the subject-matter the same, nor could the latter charge have been tried in the former case. It is too ridiculous to be seriously entertained. But a grave legal journal gravely announces that the divorce proceedings will be watched with interest; and so indeed they may be, as a fishing expedition for the body of the wife.

DETENTION OF WITNESSES.—A very powerful story, entitled "The Silent Witness," by Herbert D. Ward, was published in "McClure's Magazine" a few months ago, aimed at the unjustifiable and barbarous practice of detaining witnesses in criminal cases. This is a practice that ought to have gone out with the prisoner's box. Society has no more right to imprison a man because he saw a murder than it has to hang him for the same thing. He is not an offender. The monstrous quality of the practice is enhanced by the fact that it is only applied to poor men. If the witness is rich, he can give or get bail and go about his business, but if he is poor he goes to jail. Some comments on this story from the "Cleveland World" are exceedingly forcible and just:—

"A heart-breaking story, founded on fact, in 'McClure's Magazine' for the current month, is an arraignment of the nineteenth century civilization that, considering its boasts of enlightenment and decency, is as horrible an official crime as any that has given so dark a stain to Russian treatment of innocence.

"It is impossible to conceive of more awful, inhuman injustice than this. But the story is not overdrawn. It has happened with variations scores, if not hundreds, of times. It is occurring or liable to occur this very day, not alone in Boston, but in Cleveland.

"At a meeting of the judges, a short time ago, Judge Lamson used the following language:—

"'The detention of innocent persons as witnesses is, under the best of circumstances, bad. It is clearly the duty of the people of this country, or their representatives, to see that the present disgraceful method in vogue in the county jail is abolished. We have no right, under any law, to place innocent persons on a plane with criminals.

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It is nothing more or less than an outrage, inflicted upon helpless people. I hope that the people of this county will be aroused to the enormity of this problem, and very soon put an end to this imposition.'

"And the counterpart of the story in 'McClure's Magazine' has happened here within a short time. Lewis Gerardin, a sailor, was released last April, after being detained six months. Several months before, Frank Blaha, a saloon-keeper, who committed the crime of murder in the second degree, managed to get bail. While Gerardin was held he received pathetic letters from his wife and family, begging him to come home. They did not know why he was held, and he said that if they were to learn of his imprisonment they could not understand his innocence of crime. One day a letter was received from home, announcing that his favorite little son had died but a week before. The last words of the child called for his father. But Gerardin was not released until the prosecutor was ready to release him.

"Such possibilities are a disgrace to any community that tolerates such a horrible law or such a feeble administration of it, and such callousness to human suffering that it will not save these innocent victims from its outrageous injustice. When to this brutality are added the comparative safety of the criminal and the vile jails and the vile inmates with whom young boys and girls and honest men and decent women are thrown for the crime of witnessing a crime, it convicts the civilization of the age with a combination of stupidity and heartlessness that had better say nothing of the Czar of Russia or the ferocious Kurds. In its essential injustice and inhumanity it is not many removes from the lynchings of the South."

Some Hints on the Art of Speaking. — Under this title the "London Law Journal" gives a very sensible and entertaining article in a recent number, in which a contrast is drawn between English and American speakers, and several rules are laid down, which are better than most rules on this subject. The writer says: —

"Indeed, it is not too much to say that neither in England nor America are there any orators extant as the ancients understood an orator, or even as Pitt or Canning or Broughman understood the word. The Americans, however, without being orators, are good speakers, better, at least, in many points than Englishmen; less clumsy, less confused. They may not be superior in invention or in diction, but they possess, as their critic Mr. James Bryce admits, more fluency, more readiness, more self-possession. Any American can reel off a creditable, often an eloquent speech at a minute's notice, to the astonishment and envy of an Englishman. They have more quickness, too, in catching the temper and tendencies of an audience, more weight, animation, and grace in delivery, and crowning all this, more humor. Any rules for speaking, the result of American experience, are therefore well worthy of consideration."

Then follow the rules: (1) The speaker must be in earnest. (2) Never carry a scrap of paper before an audience. (3) Speak in a natural voice, in a conversational way; as the writer admits, the last is not fitted to the loftiest style of oratory. To these the writer adds one indispensable thing: "The voice is the soul of oratory." It must be permitted us to doubt that "Demosthenes wrote out Thucydides eight times to form his style." If he did he must have wasted his time, as much as one who should follow the celebrated advice to "spend one's days and nights with Addison." Americans possess the gift of gab, no doubt, but at present the loftiest type of oratory is lacking, possibly because the occasion for it is lacking. There are in this country plenty of excellent and entertaining speakers, but the great platform speakers have gone out with the discontinuance of the lyceum lecture system. That wide theater of education was occupied by such real orators and charming speakers as Beecher, Phillips, Curtis, Chapin, Starr King, Holmes, Bayard Taylor, Richard Storrs, Gough, and others, but that system went out with the earnest demands of the Civil War, and has never been reinstated. Oratory at the bar and in the pulpit has declined because of the limitations of time. Courts cannot afford two or three hours to one counsel, as a rule, and parishioners will not tolerate a discourse much more than half an hour in length, no matter how brilliant. The age has dwindled into one of after-dinner oratory. Probably it is none the worse for that. Oratory is a dangerous gift, on the whole, subjecting the reason of mankind to the influence of a cunning array of words and the sensuous charm of a mellifluous voice. Everybody has seen the weightiest argument, couched in felicitous phrases, fall comparatively flat on a popular audience because the speaker's voice was feeble and his manner dry. The wisest man who ever addressed an American audience, Ralph Waldo Emerson, was an example of those defects. Silly people had no patience with his frequent hesitation, although the result was to bring forth an expression fit to be handed down to all the ages. The present year is a painful reminder of the vice of public speaking. In fact, it is the Chairman's firm conviction that there is only one thing worse than running after stump-speakers, and that is the reading of all the newspapers. The English speakers who have most recently come to our shores have been men of eminent oratorical talents, of a widely different kind — Coleridge and Russell — the one suave, elegant, and tactful, the other strong, manly, and orotund, both full of merit and discretion in the matter. Americans cannot at present produce two finer orators than these distinguished men. It is probable that the sway of oratory is much stronger in the South and West than in the East, and that there is a much more audible survival of the great traditions in the former than in the latter parts of this country. The nearest approach to the ancient power of the popular orator is now seen

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at political conventions, where men are quite prepared utterly to lose their mental balance because they have already become dizzy with excitement. Then they are led like lambs to the slaughter, or what is more like, like asses to the thistles. One of the grandest and most useful exhibitions of oratory in recent years, was that of Henry Ward Beecher before the hostile English audiences, in deprecating foreign interference in the American civil war. It fully illustrated Virgil's beautiful description of the power of the orator. We rejoice that the "orator" in Chancery has gone out.

A Critic Set Right. — The "American Law Review" does the Chairman the honor to publish his Ode to Caliph Omar, forming the dedication of his recent manual on Bailments. The reviewer criticises the first stanza, which runs as follows: —

> "Omar, who burned (if thou didst burn)
> The Alexandrian tomes,
> I would erect to thee an urn
> Beneath Sophia's domes."

The reviewer says: "It might not be amiss to whisper in the ear of the ungeographical poet that Sophia is not in Alexandria, and that it has but one dome." The poet had no intention of erecting a monument to Omar at Alexandria. He well knew that Sophia is not there, and meant to do the Caliph the highest possible honor by setting up for him an urn in the greatest of the mosques, at Constantinople. As to the matter of the domes, Fergusson may settle that. In his "History of Architecture" he says: "Beyond the great dome, east and west, are two semi-domes of a diameter equal to that of the great dome, and these again are cut into by two smaller domes." So there are five domes! Our friend needs to brush up his imagination and his architectural information.

NOTES OF CASES.

Seething the Kid in its Mother's Milk. — In Port Royal Ry. Co. *v.* Davis, 95 Ga. 292, the plaintiff's counsel read to the jury from a speech made by the defendant's counsel on the trial of another and similar case, in which the latter was for the plaintiff, and in which he very eloquently depicted the ill-deserts of the defendant and appealed for damages. This was objected to on the trial, and urged as error above, but the Court did not deem it substantial error, although it deprecated the practice as likely to produce "unnecessary attrition," and bad feelings. "There should be no room in the legal profession," said the Court, "for the indulgence of personal jealousies and resentments, and the lawyer is the last man in the world who should permit himself by word or deed, to sting the sensibilities or wound the feelings of a brother lawyer." The Court put it very mildly when it said that counsel "are many times, in the course of a long professional career, required to take positions which do not seem to the casual observer to be at all times entirely consistent the one with the other." We should say so — somewhat, in a measure, to a certain extent.

A Nervous Judge. — In Walker *v.* Coleman, 55 Kans. 381, a new trial was granted because of the severity of the judge on the trial toward Mr. Solomon, of Atchison, Kansas, one of the attorneys for the defendant. The judge read at him from a law book the following; "A lawsuit is not a game to be won or lost by sharp practice and shuffling devices"; referred to him as "the gentleman from Hogtown"; said he "may do very well in his town, but it will learn him a few lessons when he comes down here"; and told him he "should have located in Missouri." The Court on appeal could not see anything amiss in Solomon's conduct, said "The trial judge seems to have considered him in the light of an intruder," and that the rights of parties "ought not to be prejudiced by any ill-feelings of the trial judge against counsel." Possibly Solomon was a "gold-bug."

A Darkey and a Mule. — In Love *v.* City of Atlanta, 95 Georgia, 129, the action was for injury caused by the running away of a mule attached to a cart, under the care of a small negro boy, and engaged in cleaning the streets of the city and carrying away the garbage. It was held that the city was not responsible, because the street cleaning was under the charge of the Board of Health, and was a governmental function. The Court concluded: "However incongruous it may appear to say that this diminutive darkey and this refractory mule were engaged in the performance of some of the functions of government, it is nevertheless true, and illustrates how even the humblest of its citizens, under the operations of its laws, may become in Georgia an important public functionary." Does the Court mean to imply that the mule was a citizen and public functionary of Georgia?

"Pints and Pintees." — In Bowdon *v.* Achor, 95 Ga. 243, the Court makes a protest against raising trivial points on appeal, as follows: "The writer once heard one of the most distinguished and successful lawyers who ever lived in Georgia facetiously remark that the questions in a noted case were divisible into 'pints' and 'pintees.' We would be very much obliged if our professional brethren would hereafter omit the 'pintees,' or at least the most trivial and unimportant ones." Why not "pints" and "pin-pints?"

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The Green Bag.

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

LEGAL ANTIQUITIES.

THE following law was passed in Virginia in 1662: —

"Whereas many babbling women slander and scandalize their neighbors, for which their poor husbands are often involved in chargeable and vexatious suits and costs in great damages. Be it enacted that in actions of slander occasioned by the wife, after judgment passed for the damages, the woman shall be punished by ducking; and if the slander be so enormous as to be adjudged at greater damages than five hundred pounds of tobacco, then the woman to suffer a ducking for each five hundred pounds of tobacco adjudged against her husband if he refuses to pay the tobacco."

FACETIAE.

JOHN ANTHON — who lives in libraries between the covers of an old calfskin treatise labeled "Anthon's Nisi Prius" — was a gentleman of solemn visage, solemn mien and solemn address while at the bar. But he was known in a moment of impatience to be once funny. Opposed to a lawyer named Edmund J. Porter, he began his address to the jury by saying, "Now, gentlemen, I shall ask your aid to bottle up Porter"; who quickly responded, "If they do, I shall foam."

WHEN Rufus Choate was a new beginner, he had to defend a young man who was a Boston broker's clerk, charged with seduction of a rather mature maiden under promise of marriage. There appeared to be little defense, but, on the day of trial in Suffolk County, Choate, seeing how extremely youthful his client was in face and size, had him dressed in low shoes, short trousers, jacket, and wide rolling childish collar over a black ribbon, and sat him down inconspicuously in the court. The prosecutor had concluded his case, and had produced much evident impression on the jury against the accused, when Choate rose to open, and, beckoning to his client, placed him on a chair and said, "I open with an exhibition of the gay Lothario." The burst of laughter was only a preface to the verdict of acquittal that soon followed.

THE late Daniel Dougherty had been examining a hack-driver in a vehicular collision case, who was asked as to his speed in the driving enquired about, and he answered, "Very slow; between a stand and a walk."

"What a curious and not understandable answer," said the judge, poising a doubtful pen; when Dougherty said, "Is not a hackman's stand usually on the walk?"

Two aged brothers named Wood were witnesses against each other on a question of seeing an assault. One testified he was seventy-nine years old, and had never tasted intoxicating liquor; the other, two years younger, confessed to having been a hard drinker all his life; when Judge Baldwin, of the Connecticut Trial Court, turned to the jury and said, "Gentlemen, here is a question of dry wood and wet wood for you to split."

NOTES.

GEORGE GRIFFIN, a famous Knickerbocker lawyer, only once defended in a criminal court. His client, when arrested, was found to have, as the policeman testified, burglarious implements in his possession. One of the sitting Aldermen said, "I suppose a brace and bits." To which the officer nodding, Griffin, who knew nothing of criminal pharaphernalia, meekly observed, "The mere possession of horse furniture is not evidence of bad character." Some lawyers refer to an op-

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LIFE INSURANCE — INTEREST. — Several decisions of novelty have been made on this point. In Adams' Adm'r, *v.* Reed, decided by the Court of Appeals of Kentucky in June, 1896 (36 S. W. R., 568), it was held that where a widow, with two unmarried children and her son-in law, live together as one family, both before and after the death of his wife, pursuant to a temporary and indefinite arrangement between him and his mother-in-law, and he pays no more than a reasonable price for his board, the mother-in-law has no insurable interest in his life. The Court said in part: —

"On the question of what is an insurable interest, the text writers as well as the Courts seem to confess an inability to suggest an entirely satisfactory answer. At least they say no accurate definition has yet been given. When we look to the cases we find that between husband and wife and parent and child such an interest has universally been held to exist. And when a sister was poor, and altogether dependent on a rich brother, who supplied her, it was held she had an insurable interest in his life. On the other hand, it has been held that a stepson has no insurable interest in the life of his stepfather (Aid Soc'y *v.* McDonald [Pa. Sup.], 15 Atl. 439), or a son-in-law in the life of his mother-in-law (Rombach *v.* Insurance Co., 48 Am. Rep. 239), or an uncle in the life of his nephew (Singleton *v.* Insurance Co. 66 Mo. 63). In Price *v.* Supreme Lodge (68 Tex. 362), it was held that the assignee of a policy had no insurable interest in the life of the insured, who was his cousin, and with whom he lived, and upon whom he was dependent for employment and support. Here it is not seriously insisted that, because the relation of mother-in-law and son-in-law existed, the one had an insurable interest in the life of the other, but it is said that relation, coupled with other relations, as shown in the pleadings and proof, created such an interest. We have not been able to reach such a conclusion. A contract of life insurance is one of indemnity. Whatever difference may exist in the numerous cases on the general subject, it is well settled that the beneficiary must sustain towards the insured such a relation as will justify a reasonable expectation of advantage or benefit from the continuance of his life, and hence of a corresponding loss in case of his death. It is this loss against which indemnity may be lawfully provided. Even in cases where the ties of marriage and blood have been held to create such an interest, the courts have traced the foundation of the right to the previous loss the beneficiary might reasonably be expected to sustain in case of the death of the insured. Certain it is that when such domestic relations do not exist no right of indemnity can be had by one person against loss caused by the death of another, unless founded on a pecuniary interest growing out of the relation of creditor, surety or the like."

But in Carpenter *v.* U. S. L. Ins. Co. 161 Pa. St. 9; 174 Pa. St. 636, it was held that a young woman, befriended by an elderly man, who sends her to school and pays her expenses, and afterwards sends her to a commercial college to learn stenography and typewriting, where she remains until his death, has an insurable interest in his life. This seems a pretty strong holding, and one having a tendency to stir up marital discord. Counsel very plausibly urged that "a married man, living with his wife, who manages his household, cannot, without the wife's co-operation or consent, give an adult woman who comes into his family, as a domestic servant, a quasi-parental interest in his life."

On the other hand, in Trinity College *v.* Travellers' Ins. Co. 113 N. C. 244; 22 L. R. A. 291, it was held that to constitute an insurable interest there must be some ties of blood or marriage, or some contractual relation, and therefore a college supported by a church has no insurable interest in the life of a member of that church, although he made the application and the college paid the premiums.

INJURY BY INTOXICATED PASSENGER. — In Galveston, H. & S. A. R'y Co. *v.* Long, decided by the Court of Civil Appeals of Texas in May, 1896 (36 S. W. R. 485), it was held that a carrier of passengers has power, and it is his duty, to refuse to receive or to convey, as a passenger, one whose conduct is such as to lead a reasonably prudent person to anticipate that his presence will endanger the safety or interfere with the convenience or reasonable comfort of the other passengers; but it has no right to eject a passenger, who, though intoxicated, conducts himself in a proper manner, and it is not liable for an injury to another passenger which it could not reasonably anticipate. It appeared that a passenger on a railway train, who was somewhat intoxicated, and walked a number of times through the the cars, looking for someone, though he conducted himself without offense towards the other passengers, accidentally stumbled over some baggage, and a revolver fell from his pocket and was discharged, wounding another passenger in the foot. It was held that the carrier had no reason to anticipate such an accident, and was not liable for the injury.

The Court relied on Putnam *v.* Railroad Co. (55 N. Y. 108; 14 Am. Rep. 190), some remarks in which fully justify this holding. Indeed there was much better reason for arguing that a drunken passenger, who had insulted a passenger, as in the Putnam case, should be ejected as dangerous, than that the carrier should foresee that a drunken passenger, who had done nothing improper, would stumble and discharge a pistol in his pocket and accidentally wound another passenger. This case is an appropriate companion to that one of the alcohol in the bag and the ignition of the celluloid cuffs, which we lately cited.

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The Green Bag.

Published Monthly, at $4.00 per Annum. Single Numbers, 50 Cents.

Communications in regard to the contents of the Magazine should be addressed to the Editor, Horace W. Fuller, 15½ Beacon Street, Boston, Mass.

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

LEGAL ANTIQUITIES.

THE following law was passed in Virginia in 1662: —

"Whereas many babbling women slander and scandalize their neighbors, for which their poor husbands are often involved in chargeable and vexatious suits and costs in great damages. Be it enacted that in actions of slander occasioned by the wife, after judgment passed for the damages, the woman shall be punished by ducking; and if the slander be so enormous as to be adjudged at greater damages than five hundred pounds of tobacco, then the woman to suffer a ducking for each five hundred pounds of tobacco adjudged against her husband if he refuses to pay the tobacco."

FACETIAE.

JOHN ANTHON — who lives in libraries between the covers of an old calfskin treatise labeled "Anthon's Nisi Prius" — was a gentleman of solemn visage, solemn mien and solemn address while at the bar. But he was known in a moment of impatience to be once funny. Opposed to a lawyer named Edmund J. Porter, he began his address to the jury by saying, "Now, gentlemen, I shall ask your aid to bottle up Porter"; who quickly responded, "If they do, I shall foam."

WHEN Rufus Choate was a new beginner, he had to defend a young man who was a Boston broker's clerk, charged with seduction of a rather mature maiden under promise of marriage. There appeared to be little defense, but, on the day of trial in Suffolk County, Choate, seeing how extremely youthful his client was in face and size, had him dressed in low shoes, short trousers, jacket, and wide rolling childish collar over a black ribbon, and sat him down inconspicuously in the court. The prosecutor had concluded his case, and had produced much evident impression on the jury against the accused, when Choate rose to open, and, beckoning to his client, placed him on a chair and said, "I open with an exhibition of the gay Lothario." The burst of laughter was only a preface to the verdict of acquittal that soon followed.

THE late Daniel Dougherty had been examining a hack-driver in a vehicular collision case, who was asked as to his speed in the driving enquired about, and he answered, "Very slow; between a stand and a walk."

"What a curious and not understandable answer," said the judge, poising a doubtful pen; when Dougherty said, "Is not a hackman's stand usually on the walk?"

Two aged brothers named Wood were witnesses against each other on a question of seeing an assault. One testified he was seventy-nine years old, and had never tasted intoxicating liquor; the other, two years younger, confessed to having been a hard drinker all his life; when Judge Baldwin, of the Connecticut Trial Court, turned to the jury and said, "Gentlemen, here is a question of dry wood and wet wood for you to split."

NOTES.

GEORGE GRIFFIN, a famous Knickerbocker lawyer, only once defended in a criminal court. His client, when arrested, was found to have, as the policeman testified, burglarious implements in his possession. One of the sitting Aldermen said, "I suppose a brace and bits." To which the officer nodding, Griffin, who knew nothing of criminal pharaphernalia, meekly observed, "The mere possession of horse furniture is not evidence of bad character." Some lawyers refer to an op-

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ponent as "my learned adversary." Griffin invariably used the term, "my learned enemy." "As if it were possible for you to have an enemy," once kindly observed Charles O'Conor, when opposed to him.

It was the statutory duty of District-Attorney Oakey Hall, of New York City, to attend an execution as witness, but he always shirked it. When Sheriff John Kelly asked why, he repeated James Russell Lowell's lines from "Fable for Critics": —

"——— Shall I look on the prancing
Of a wretch who has not the least ground for his dancing,
Whose legs and whose arms go in curious divergence:
His clothes to the Jews and his body to the surgeons?"

The late Recorder Hackett was given to clever repartee. On one occasion, in a murder trial, he had to speak severely to a medical witness called to explain a scientific operation, and who answered rather pertly on several occasions. On the next day he was still in the witness chair, when it occurred to him to apologize. Whereupon Hackett said, "All right, doctor; yesterday you were a pert, but to-day I can call you an ex-pert."

One of the songs often sung at the mess in Gray's Inn, London, has this verse: —

Now this festive occasion our spirits unbends,
Let us never forget the profession's best friends.
So we'll send the wine round and a nice bumper fill
To the jolly testator who makes his own will.

The sarcasm of the toast applies curiously to the late Samuel J. Tilden, who was not only a jolly testator but an acute lawyer. The courts set aside a library trust in his will, and are now engaged in hearing an amicable suit for construing some doubtful provisions.

The refrain of the Gray's Inn song is even more precise in its sarcasm, for it runs: —

Oh the law, when defied, will avenge itself still
On the man and the woman who make their own will.

Sir Robert Graham, a Recorder of London, when sitting in the Old Bailey during the last century, was remarkable for his extreme courtesy and politeness. On one occasion, having sentenced a convict to transportation, and being told by the clerk that he had made a mistake, because the prisoner should have been sentenced to execution, immediately said, "Dear me, have I been so careless? Bring back the convict" — who had been withdrawn from the room. Which being done, the Recorder put on the traditional black cap and began: "Prisoner at the bar, I beg your pardon for this inconvenience of again summoning you," and then proceeded to pass the most awful sentence of the law — which Peter Pindar has thus phrased: —

The Judge — the black cap on his head —
Unto the trembling culprit said,
"Hanged by the neck 'til you be dead."

A London paper states that, exclusive of costs, the fees and refreshers in the recent *cause célèbre* of Kitson *v.* Playfair for damages in slander amounted on both sides to five thousand pounds. What a chasm lies between such fees and the £250, which were the aggregate of all the counsel fees in the great trial (1688) of the seven Bishops of England; or between the "now" and the "then" of 1476, when an entry was made, still visible in the records of St. Margaret's Church, Westminster, over which the venerable Archbishop Farrar now presides, of a payment made by the vestry to a barrister with the odd name of Roger Fylpott, of his charges, three shillings and eight pence, with four pence for his dinner. The which is narrated in Johnson's Life of Coke, page 211.

A negro having been arrested in Pennsylvania and lodged in jail, charged (1) with assault and battery, and (2) assisting a prisoner to escape, was confined some two months before the term arrived at which he was tried. When incarcerated he was poorly clad. His case being ready for trial, the sheriff, who was also keeper of the jail, procured for the negro, at the expense of the county, a suit of shoddy clothing, costing about five dollars, and directed him to don them that he might appear respectable before the court. On the trial he was acquitted of the charge, but the jury imposed the cost of his own witnesses upon him. In accordance with the verdict sentence was passed by the court, and he was again taken in custody and returned to jail. He soon complied with the sentence in every particular, but the sheriff refused to release him until he surrendered the clothing. Motion was then made for his discharge, which was refused, the Court

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directing the sheriff to retain him in jail, and that he be placed in a dungeon, without food or water, until he surrendered the clothes. *Habeas corpus* was then asked and granted. To this the sheriff answered that he detained and had the negro in custody, had had him in a dungeon as ordered, but, *that he was not held for any criminal or supposed criminal matter*, but that he had not surrendered the clothing. His discharge was again moved for and answer made that the difference between him and the sheriff, as to ownership of the clothing, must be determined in a civil court. This application, for discharge under *habeas corpus*, was denied, the negro ordered to stand up, and sentence passed as follows: "You shall be confined in jail until you divest yourself of those clothes, and I will see that this is done," with a side remark to the officer, "Put him in a dungeon and turn a stream of water on him." What may we not look for next?

A STATUTE of New York provided that if an officer in a corporation refused, on request of a stockholder, "to exhibit the books, or to submit them to an examination," he should forfeit a certain sum. The defendant contended that the stockholder could not take off a list of stockholders. "It was supposed," said the Court, "that the etymological meaning of the words "exhibit" and "examine" limited their meaning to the construction contended for by the defendant. If the derivation be from *examen*, a swarm of bees, it may be supposed to imply the industry and perseverance of the *bee*, and would then authorize a search as thorough as the most earnest could desire; and not only a search, but that the best part of that which is searched, should be carried off to be converted to a good and useful purpose. Brouwer *v.* Cotheal, 10 Barb. 216.

LITERARY NOTES.

THE definition, object, and sphere of taxation are treated by David A. Wells in APPLETONS' POPULAR SCIENCE MONTHLY for September. Many popular errors as to the nature of taxation, some centuries old, are pointed out in this paper. The same number contains an abstract of the recent studies of Enrico Ferri on "Homicide" among both savage and civilized men, with some consideration of "crime among animals."

IN the September REVIEW OF REVIEWS the editor discusses different phases of the Presidential campaign — especially the revolt of the gold-standard Democrats, the attitude of Eastern wage-earners toward Mr. Bryan, and the spread of free-silver doctrine among the farmers. Another important topic of discussion in the department of "The Progress of the World" is Lord Salisbury's Venezuelan proposition, in connection with the general scheme for a permanent tribunal of arbitration. The editor also covers most of the striking developments of the month in British and European politics.

THE September CENTURY abounds in articles of timely interest, and in an unusual variety of fiction. No serial story of the present time is attracting so much attention as Mrs. Humphrey Ward's "Sir George Tressady." Mr. Howells's lively story of Saratoga, "An Open-Eyed Conspiracy," is continued; and Mrs. Amelia E. Barr contributes the first part of a novelette, "Prisoners of Conscience," which deals with life in the Shetland Islands, and is strikingly illustrated by Louis Loeb. The short stories of the number are "Sonny's Diploma," by Mrs. Ruth McEnery Stuart; "Abner," by Lynn Roby Meekins; and "The Healing of Meechum," by Frank Crane.

GENERAL HORACE PORTER'S personal recollections of General Grant, which THE CENTURY will publish beginning in November, are to be called "Campaigning with Grant." General Porter first met General Grant at Chattanooga; he soon became attached to his staff, and was with him constantly from that time until the close of General Grant's first term as President, during which he was Grant's private secretary.

THE frontispiece of the September issue of the NATIONAL MAGAZINE is the portrait of the great Chinese statesman, the Viceroy Li Hung Chang, whose present tour of the world is a matter of more than passing note. The leading article is a sketch of the Viceroy's life, outlining in a brief way the achievements of this Bismarck of the East. The illustrations accompanying the article are from photographs taken in China. The writer is Mr. Arthur W. Tarbell. "The Curse of the East," a descriptive paper written by C. H. Gibbons, dealing with the banishment of lepers on Darcey Island, is a decided magazine novelty. The photographs of the lepers and their cabins will be a revelation to the reading public. Mr. Edmund S. Hoch's second and last paper on "Yachting on the Great Lakes" appears in this number, with accounts and photographs of the most prominent yachts and yacht clubs on the inland Lakes.

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McClure's Magazine, with a stirring barrack-room ballad by Kipling, a thrilling installment of Anthony Hope's "Phroso," a dramatic sea-story by an actual sailor, and characteristic stories by Mrs. Spofford and Clinton Ross, maintains, in the September number, its usual enticing aspect. In scanning a table of contents of McClure's, one never experiences, it must be allowed, the familiar difficulty of finding something one really cares to read.

Tom Sawyer, Detective, Mark Twain's latest story, is finished in the September Harper's in a generous installment, embellished with eleven illustrations by A. B. Frost. This dramatic story of life in the middle West, a generation ago, seems likely to add to the reputation of even so famous a personage as Mr. Clemens's well-known hero.

The North American Review for September opens with a most interesting paper by His Exellency, Sir Alfred Moloney, Governor of British Honduras, entitled "From a Silver to a Gold Standard in British Honduras," wherein is described a financial transaction unique in the history of currency, and the material benefits derived from an establishment of a country upon a gold basis. Justin McCarthy, M. P., contributes a most entertaining account of "The Late Session of Parliament." Mr. McCarthy gives a remarkably clear insight into English politics as they exist to-day, and points out the internal elements of discord corroding the strength of the government.

BOOK NOTICES.

LAW.

The Strange Schemes of Randolph Mason. By Melville D. Post. G. P. Putnam's Sons, New York, 1896. Cloth.

Mr. Post has hit upon a most ingenious scheme for enlisting the reader's interest in legal matters, and these stories are quite as absorbing as any detective tales. Randolph Mason, a shrewd but unscrupulous lawyer, devotes his great abilities to the task of showing his clients how they may commit the most flagrant wrongs, and yet through the technicalities of the law escape the slightest punishment. It may be objected that the writer has prepared a text-book for shrewd knaves, but his answer is that if he instructs the enemies, he also warns the friends of law and order. The stories are admirably well written, and one will not lay the volume down until he has reached the end.

MISCELLANEOUS.

Where the Atlantic meets the Land. By Caldwell Lipsett. Roberts Brothers, Boston, 1896. Cloth. $1.00.

This collection of stories, Irish in scene and character, will serve to while away a leisure hour most agreeably. The author displays much versatility, and no little dramatic power. The volume contains sixteen sketches, all of them well worth reading.

In Scarlet and Grey. By Florence Henniker. Roberts Brothers, Boston, 1896. Cloth. $1.00.

These stories of soldiers and others are delightfully written, and form one of the best collections of short tales that we have read for a long time. The stories are all wonderfully well told, displaying much power and pathos on the author's part.

Old Colony Days. By Mary Alden Ward. Roberts Brothers, Boston, 1896. Cloth. $1.25.

Mrs. Ward, in a series of most readable sketches, brings forward, for our better acquaintance, some of the old Colony days' worthies: Governor William Bradford, whom she styles, "The Father of American History"; Cotton and Increase Mather, the "Early Autocrats of New England"; and that "Old-time Magistrate," Samuel Sewall, whose "Diary" has stood the test of years. There are also sketches entitled, "Some Delusions of our Forefathers," and "A Group of Puritan Poets." The book is one of great interest, and contains much valuable information.

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COUNT JOHANNES.

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The Green Bag.

Vol. VIII. No. 11. BOSTON. November, 1896.

COUNT JOHANNES.

By Irving Browne.

ONE of the most remarkable figures that ever appeared at the bar in this country was that called by its proprietor the Count Johannes—lawyer, litigant, actor and author, and not a striking success in any department. He was born plain George Jones, in England, in 1810, and came to this country about 1828, but of his antecedents and of his general personal history there is very little recorded, and it does not matter very much. He seems to have been originally an actor, and drifted into the other avocations. It is said that his title of Count Johannes was conferred on him by a company at a convivial dinner, at London, evidenced by a solemn parchment. (Mr. Willard in "Half a Century with Judges and Lawyers," says this was proved in a libel suit brought by the Count for being called "a *soi-disant* Count.") Others say that he actually bought it from a petty German principality—one of those which a century earlier furnished soldiers for hire to put us out of existence, and then were willing to ennoble us for our success. (After his death it was reported in the newspapers that he had conferred this voucher on Mr. Fairbanks, of New Jersey, to whose daughter he was reported to have entrusted his MS. autobiography.) It is probable at all events that he was regarded as a fit subject for a mock title. He is accorded something more than an inch in Allibone's Dictionary of Authors. He published, early in the decade between 1840 and 1850, a "History of Ancient America," and a volume composed of a "Life of General Harrison," "Tecumseh, a Tragedy," and an "Oration on Shakespeare." His name does not appear in the Century Cyclopœdia of Names, except as "the parricide" of the 13th century. Of the merits of his historical essay there are conflicting opinions. Sir Samuel Rush Meyrick was of opinion that he had fully proved his theory of the Tyrian origin of the ancient temples in Central America; but the London Athenæum regarded him as "a shallow writer," and Chief-Justice Daly thinks it entitled to no more consideration than his title. At this time, however, he was treated seriously. President Pierce gave Hawthorne the consulship at Liverpool for writing a campaign life of the President, but the Count seems to have got nothing from the last President Harrison for writing that life of his ancestor. He made his *debut* on the stage about 1833, and for some years resided and managed a theatre in Richmond, Va. During the last years of his life he trod the stage at his own financial risk, with companies of amateurs, and generally his appearance was the occasion of what Americans call "circuses," in which the audience and not the actor took the part of clown. The Count seems to have been a person of respectable talents and of some scholarship, but of an overweening vanity, nearly allied to madness, and reminding one of Malvolio. He had no legal education, but he claimed to be a member of the Massachusetts bar, yet apparently his clientage was chiefly in his own person, for he was continually suing for slander and libel of himself. As wisdom is sometimes born of foolishness, so at least two of the leading cases on this

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branch of law in this country bear his noble name as plaintiff.

He was admitted to the bar of New York by Judge George Barnard's general term, about 1862, as a joke; and he picked up a little poor practice, always appearing in a velvet coat, with many decorations. At the bar and in the newspapers he was the butt of the merry Bohemians of that city, who wrote derisive articles about him, and then persuaded him to apply for indictments and bring actions for damages, all of which came to nothing. A district attorney was one of these tormentors and abetters, and Judge McCunn, who presided, was in the secret. The counsel on both sides treated the Count with mock deference, always addressing him by his full pretended title of "Le Chevalier George Count Johannes," on every possible occasion. The court-room was packed, and thus was the poor fellow roasted to make a Gotham holiday. I do not know that these proceedings were alleged as a ground of impeachment against Barnard and McCunn, but poor Jones had his revenge, perhaps without knowing it. That district attorney, now elderly and gray-haired, writes me of these juvenile capers in a strain of unholy glee, and says they made "a rare *opera bouffe*."

The Count once applied to the Supreme Court of New York for an injunction to restrain Sothern, the actor, from appearing in a character which the Count claimed to be a burlesque of the plaintiff, called the "Crushed Tragedian." The motion was denied upon the grounds that he produced no precedent for such an action, and no proof that the allegations of his complaint were true. (A sculptor presented to the New York Press Club a statuette of Sothern in this character.)

Although the Count's law was not generally esteemed as remarkable for soundness, yet he was the cause that sound law was in other men. In the leading case of "The Count Johannes" *v.* Bennett, 5 Allen, 169, it was held that a letter to a woman, containing libelous matter concerning her suitor, cannot be justified on the grounds that the writer was her friend and former pastor, and the letter was written at the request and with the approval of her parents. The Count conducted his own case, at least on the appeal. There was a verdict for the plaintiff, of $2000, I believe, which seems generous considering that the letter did not intimidate the young woman, who married the Count in spite of it. The jury probably intended to punish the minister for his officious intermeddling. In another place the present writer thus described the action: "The lady in question was a widow, who had been a member of the defendant's church choir, and resided with her parents, who were members of the church to which he formally ministered. The Count visited Massachusetts, and there met the quondam soprano, and cast about her the witchery of his melancholy spell, and caused her to love and desire to marry him. The plebeian parents, with a base hatred of high birth and aristocratic mien, made objections, and persuaded the minister to write a letter to the daughter casting aspersions upon the Count's fair fame. For this the jury gave him damages. The court said the matter was none of the defendant's business, that he had no interest in it, and that his act was not in the performance of any duty. They declined to consider the matter in the light of the pastoral relation, holding that as the widow had ceased to sing for him he had no privilege to write to her, or at least to abuse the good and noble Count."

It is evident that the Count was not a profound lawyer, for his lady-love having handed him the offending letter on the day before their marriage, he destroyed it, and took no copy. On the trial he was allowed to recite its contents from memory, and the Supreme Court held this to be error, and granted a new trial, on the ground that a party may not destroy primary evidence and substitute secondary evidence for it. The court should

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have made an exception in the Count's case, as he was an actor, was accustomed to commit things to memory, and probably "had a good study," as the profession are wont to express it.

The Count seems to have been rather proud of this case, and to have lost no opportunity of lugging it into court. He even introduced a reference to it on the famous Tilton-Beecher trial — not as counsel, but on a question of personal privilege. He is reported to have said: "May it please your Honor. One moment — as I am a counsellor of the court, I believe I can avail myself of the courtesy which you have just now extended to me. In my absence yesterday, my brother Evarts, who is my friend, quoted from a Massachusetts report in reference to me, and as published by the press, most injuriously. While I believe they published simply what took place, I discard from my mind the slightest intent on the part of my brother Evarts to injure me — I know he would not. I have the honor of the friendship of counsel of both sides. In Massachusetts I was approaching a marriage with a young lady, and a reverend gentleman interposed a letter of libel upon me, and destroyed five visits to that lady. Important. And on the day before the marriage, in generosity, I burned that letter; and on the next day after my marriage he wrote another letter that he could prove what took place. I brought my action, and for these five visits alone the jury gave me $100 for each. For with that power of language which I have as well as Rev. Ward Beecher, one hour with a lady is equal to three months with mere clods of humanity. I wish to vindicate myself, and that my brother Evarts — I see Judge Porter there with melancholy thought — that he will upon occasion do me justice." Just how the Count broke into this trial does not appear, but it was probably as *amicus curiæ*. At all events he undoubtedly was heard with forbearance and courtesy by that accomplished gentleman, scholar and lawyer, the late Judge Neilson, who presided at that famous trial.

Another action brought by the Count is George the Count Joannes *v.* Burt, 6 Allen, 236. This was an action of slander for words spoken by the defendant as counsel on the trial of the Count's suit for slander against Nickerson. This report is a great curiosity. The Count in his declaration averred that he was "by professional vocations a public author of historical and other literary works, and a public lecturer, and public oratorical illustrator of the Sacred Scriptures, and the works of Shakepeare, for reputation, income, profits and emoluments as exemplified by the annexed Exhibit A." (This was a printed circular addressed "to committees of Lyceums, etc.," stating the "Public Orations and Discourses, written and pronounced in Europe and America by 'George Jones,' the Count Johannes, Imperial Count Palatine," and offering to pronounce them in New England for $100 each and his traveling expenses, and giving a list of gentlemen who had signed letters of invitation to him.) The Count also averred that he was a practicing attorney and counsellor in the courts of Massachusetts, in which "intellectual employments the unimpaired reason and the reasoning powers of plaintiff are a condition precedent," etc. Then he averred that defendant was an abolitionist, and therefore the enemy of plaintiff and his country, as "a public supporter of that ultra and sanguinary creed," which he had "denounced in three public orations at Faneuil Hall, Boston (and before several thousands of his fellow citizens)." That the defendant in his address to the jury on said trial had charged that he, the Count, was insane, "diseased and possessed in plaintiff's own proper person with the most terrible of God's inflictions upon mankind, that of the infectious and transmissible physical and mental disease of insanity," "casting desolation, misery and sorrow upon plaintiff, and

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increasing his sufferings by the sad reflection that the slander upon the father also slanderously taints the mental condition of plaintiff's children"; and most of all that this was said in the presence of the Countess (was she not contributorily negligent?); and finally that the defendant well knew it was "totally untrue, atrocious, actionable, and most malignant in its mendacity." He was modest to ask for all this only $10,000. But the court sustained a demurrer for want of an averment of special damage, limiting the cases of recovery on account of a false charge of disease to "the plague, leprosy, and venereal disorders."

The action against Nickerson was for sending him a notice of motion in an envelope on which was printed a picture of a jackass with the word "secessionist" under it. He also sued Gov. Andrew for libel.

The Count had better fortune in his action against The Bee Printing Company, of Boston, to which may be found an allusion in his brief in Hamilton *v.* Third Ave. R. Co., 53 N. Y. 25, in which he spoke of it as "the memorable action for libel," and in which juries awarded him, as a salve for the stings of the outrageous Bee, verdicts of $2500, $1500, and $2000. The Count was thus fortunate not only in extracting one cause of action for slander out of another, as in the Nickerson case, but in furnishing precedents in his own person, as in the Hamilton case. In the latter case, on the question of exemplary damages, he referred to an English case where a verdict of £500 was sustained for knocking a man's hat off, on the Royal Exchange, because such exemplary damages tend to prevent duelling. His brief in the Hamilton case is a very sane and judicious one, without the slightest exhibition of eccentricity, which leaves one to suspect that he did not make it.

The Count also sued the proprietors of the New York "Times" for libel, and recovered a verdict in 1875 (but a new trial was granted on account of a misdirection of the judge). (Johannes *v.* Jennings, 6 Thomp. & Cook, 138.) I find no subsequent trace of the action.

It will thus be seen that the juries were generally on the side of the Count, and gave him large damages, probably being of opinion that when people choose to make wanton fun of others' infirmities, they should be compelled to pay for the privilege.

The Count's name appears as plaintiff in two other cases in New York, one against Day (3 Robertson, 650), and the other against Fisk (*ibid.* 710), both involving mere points of practice. The latter was an action for libel; the nature of the former does not appear.

In 6 Allen appears a group of four actions brought by the Count against Underwood, Pangborn and Mudge respectively, chiefly involving practice questions, all determined adversely to the Count. The action against Underwood was for libel expressed as follows: "There flourishes a *soi-disant* count with his decorations given by the Grand Duke of Pumpernickel, or bought from some similar august potentate." In the action against Pangborn he recovered twenty dollars, and it was held that he could have no costs. In the Mudge case it appeared that the defendants, sued for libel, employed the Count, who was not an attorney at law, to defend them, by virtue of a special power of attorney, on the parol agreement that he should charge nothing for his services. It is said that the Count was finally suspended from practice in New York for barratry.

The Count's first love was the theatre, and on his removal to New York he set up as a teacher of dramatic "hart" (as he called it).

Mr. Willard records that when playing Romeo at the Boston Theatre, having gone down on his knees, he had to be assisted to his feet on account of the stiffness of his joints. This reminds one of Gibbon, who went down on his knees to a lady who had to help him up because he was so fat.

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The Count's favorite part seems to have been Hamlet. Nature had fitted him for this, and saved him much trouble, for he was not obliged to "put an antic disposition on." He was even better equipped for his part than that enthusiastic actor who was accustomed to black himself all over to play Othello. He was a "star" who "shot madly from his sphere." Possibly the frequent affectation of insanity in the part drove him distraught in fact. Yet Mr. Phelps does not include the Count in his book on the Representatives of Hamlet. On the other hand, Laurence Hutton, in his agreeable "Curiosities of the American Stage," includes him, and gives his portrait, as Hamlet, from which that accompanying this sketch is produced. Mr. Hutton quotes George Henry Lewes' assertion that "no actor has been known utterly to fail as Hamlet," and remarks that he evidently forgot, first, infant prodigies; second, ladies; third, men who burlesque it; and fourth, "men who fail not only as Hamlet but as everything else," and continues: "of the fourth, George, the Count Johannes, in his later days, was a brilliant example. His occasional productions of Hamlet for his own benefit, a few years ago, were the source of much silly amusement, and rude horse-play upon the part of audiences not wise enough to appreciate the mental condition of the unfortunate star, or their own want of taste in encouraging his buffoonery even by their ridicule. His support, composed entirely of amateurs, was without question the worst that any Hamlet has ever known in this country; but his own performance was neither good enough to be worthy of any notice whatever, nor bad enough to be funny. The connection of George Jones with the American stage as a professional actor, dates back to the early days of the Bowery Theatre. He made his American *debut* there as the Prince of Wales in Henry IV, on the 4th of March, 1831. He played Hamlet at the National Theatre in 1836, and he repeated the part (before he became too mad to portray even the mad prince) many times, not only in this country, but in England. The last occasion which merits even a passing word being at the Academy of Music, New York, on the 30th of April, 1864, when he was associated with Mrs. Brougham (Robertson) as Ophelia, and Mrs. Melinda Jones as the Queen." So his Countess was his Queen. It is greatly to his credit that he chose to marry one of his own profession rather than sell his title to an heiress. His wife was a person of respectable histrionic talents, and the pair had a clever daughter, Avonia (named after Shakespeare's Avon, probably), who followed her parents' calling, and acquired fame at home and in England as "Leah, the Forsaken." Mr. and Mrs. Jones separated after a while.

He made his final exit, in New York, on December 20, 1879. His favorite pupil, Miss Lydia Avonia Fairbanks, of New Jersey, attended him in his last moments, and it was due to her devotion that his remains were not buried in Potter's Field. Through her exertions, and the charity of a number of persons connected with the stage and the press, on January 5, 1880, his body received the last rites of religion, not "maimed," at the "Little Church around the Corner," and were interred at Maple Grove Cemetery, Long Island, in a lot given to Miss Fairbanks for the purpose by a generous gentleman. There was no meeting of actors on the occasion, for the Count was not considered an actor. There was no meeting of the Bar, for he was not regarded as a lawyer. But according to Dr. Putnam, his friend and physician for thirty years, who had often lent him money, the theatre and the Bar have frequently been convened over more unworthy although saner men, for he said: "I never knew him to tell a lie nor to leave one of the small sums to which I have referred unpaid."

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THE VEHMIC COURTS OF WESTPHALIA.

By George H. Westley.

ABOUT thirty years ago, when the march of progress had brought the railway to the little city of Dortmund, it became necessary to cut away a small hill in order to build a depot. In doing this the workmen had strict orders to leave untouched a solitary and very ancient linden tree; so that at the conclusion of their labors this old relic of the past reared itself on a pedestal of earth fifteen feet high in the center of the excavated space. And there it may be seen to-day, if I am not mistaken, standing a monument to one of the most curious vagaries of old-time law and order.

Under this tree were held the meetings of the Vehmgericht, that secret and terrible tribunal which has played no unimportant part in old tragedy and romance. Concerning the word "Vehm," there has been much learned controversy, and nothing short of a page could do justice to the speculations as to its derivation. The German writer Grimm has worked the matter out at great length, taking up and controverting the claims of other writers with considerable success. The sum of his investigations, however, seems to be that the word was derived from "vêm," which in the Netherlands signified fellowship, so that Vehmgericht would simply mean a fellowship, or society for the administration of justice.

It is the general opinion of the old historians that the Vehmgericht was established by Charlemagne. Its purpose, said some of them, was to coerce the Saxons into Christianity. A picturesque tradition had it that Charlemagne, finding himself powerless to prevent the relapse of the Saxons into paganism, sent to Pope Leo III for advice. The ambassadors found the pontiff in his garden, and while they were telling their tale, Leo silently but significantly pulled up handfuls of weeds and thistles and hung them on a miniature gallows which he had constructed of twigs. The interview over, the ambassadors returned and related what they had seen, whereupon the monarch followed out the hint by instituting the secret tribunal. Many things might be said both for and against the truth of this story, but in this brief study we need not stay to mention them.

It should be clearly understood that in the middle ages the German Empire was ruled by what has been called Faustrecht or fist-right; in plain terms, the right of might. From beyond their fortified walls the knights and barons sneered at law, and frequently defied even the imperial decrees. Thus the operations of the ordinary courts were without force, and wholly inadequate to secure the ends of justice. It is told that the officials who went to serve a writ on Siegmund von Senssheim were imprisoned and tortured, and that the Count von Fekeneberg, deigning to answer a summons, appeared at court with an armed retinue which awed his accusers into silence. It was from this condition of affairs that the Vehm arose, and it filled the crying need of the time for fair and honest dealing between man and man.

A vital difference between the Vehm of Westphalia and the secret tribunals of other countries, such as the Vendetta of Italy and our own Vigilance Committee, was this, that the former was sanctioned by imperial authority, and was not amenable to the ordinary laws of the country in which it existed. It was a free court, responsible to none save the Emperor, and as he himself was a member and subject to the same

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oath, it was of course practically supreme.

The territory over which the jurisdiction of the Vehmic courts extended was divided into districts, in each of which there was at least one court, presided over by a judge called Freigraf, or free count. The candidate for admission as a member, or "Freischöffe," was to be a free man, born in lawful wedlock, and one who had lived a life of good repute. On this latter point they were very strict. If it was discovered that a man desired to enter only to escape the consequences of former ill-doing, he was led to the nearest tree and there taught that the object of the association was to repress crime, and not to secure safety for criminals. Ecclesiastics, Jews, heathen, and women were excluded.

The rights and privileges of the brotherhood could be acquired in only one way: by a solemn form of initiation which changed not even for the emperor himself. Moreover, to be valid, the ceremony had to be performed on "the red earth of Westphalia."

The candidate, having satisfied the assembled Freischöffen of his fitness, was required to kneel before the Freigraf, holding in his right hand the hilt of a sword, to which a halter was attached, and to repeat this solemn oath: "I swear by the Holy Law that from this day forth I will keep and hide the Vehm from sun and from moon, from water and from fire, from all creatures and from all living men, from father and mother, from sister and brother, from wife and child, from friend and kin, and from all that God ever created, excepting the man who has sworn the oath and is a Freischöffe; furthermore, that from this day forth, I will bring before this tribunal, or some other free tribunal, to be judged according to justice or according to mercy, whatever is cognizable by the Vehm, whether I know it of my own knowledge or learn it of a truthful man, whether it be in the bye-way or highway, by night or by day, in wood or in field; whether it be in the tavern, in wine or beer-houses, or in the church; whether it be in the whole world; and this I shall not forbear to do for love nor for hate, for friend nor for kin, for silver nor for gold, nor for the sake of anything that God has created or made in the world; furthermore, that from this day forth I will neither say nor do, in word or in deed, anything against the King or the Holy Empire's secret ban. All these words that have been here spoken before me and which I have repeated, I swear to keep truthfully and stedfastly, as a true Freischöffe should keep them, so help me God and the saints."

After this oath had been administered, the Freigraf turned to the Freifrone, who seems to have held an office similar to that of our clerk of the court, and bade him announce the penalty decreed against him who broke his oath. Then the Freifrone read as follows: "If this man shall break his oath, or reveal any part or portion of the secrets of the Holy Ban, he shall be seized, his hands bound together, and a bandage put over his eyes; he shall be thrown upon his back, his tongue shall be torn from his throat, a three-stranded rope fastened about his neck, and he shall be hanged seven feet higher than a common thief."

The members of the Vehm had secret signs by which to recognize each other. When two of them met, each placed his right hand on his left shoulder and said: —

> "I give you greeting, comrade dear,
> What is it you are doing here?"

At table a member of the brotherhood might be known by the position of his knife, the point of which was invariably turned towards him. The passwords to their meetings were, "Strick, Stein, Gras, Grein"; besides which they had as a "need word" "Reiner dor Feweri." What these words meant to them has remained a secret to this day.

At an early period in the history of the Vehmic courts the crimes which they under-

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took to punish were those of heresy, apostasy from Christianity, perjury and witchcraft. Gradually, however, they assumed a more general jurisdiction, and at length came to deal with all offenses "against God, honor, and justice." If a man, having lost a case in the ordinary courts, failed of compliance with that court's decree, the complainant might bring him before the Vehmgericht, which would proceed against him as one guilty of an offense against law and order, in their code a capital crime.

Their method of citing persons to appear before them was as follows: The Freigraf drew up the summons and entrusted it to two Freischöffen, who were sworn to serve it on the accused, and were afterwards compelled to declare on their oath that they had done so. The case was to be heard six weeks later. If at that time the accused did not appear, a second summons was served by four Freischöffen, and another six weeks elapsed. If a third summons was necessary, eight members took the matter in hand. Unenviable indeed was the position of the man who ignored this last. He was adjudged guilty by default, and sentence was passed upon him by the judge in these terrible words: "I denounce him here by all the royal power and force, as is commanded by the royal ban. I deprive him — as an outcast and a banished man — of all the peace, justice, and freedom he has ever enjoyed since his baptism, and I deprive him henceforward of the enjoyment of the four elements. I declare him condemned and lost. He shall enjoy neither law nor justice, and I herewith curse his flesh and blood. May his body never receive burial, but may it be carried away by the wind, and may the ravens, the crows, and the wild birds of prey consume and destroy him. His neck I adjudge to the halter, and his body to be the prey of the birds, and of the beasts of the air, the sea, and the land; but may God have mercy upon his soul.

The almost invariable sequel to this was that the body of the condemned was presently swaying in the breeze from a neighboring tree, with a dagger driven in the trunk beside it to indicate that this was the doing of the Vehm.

The expression "secret tribunal" is very apt to bring to our minds the picture of a company of black-robed, masked men, gathered at midnight in some gloomy vault. The Vehmgericht was no such body. It held its meetings "in the eye of the light and in the face of the sun," under some chosen tree, such as the one at Dortmund. The legal hours were between seven and one, although if occasion required, the sitting might be prolonged till sunset.

On the day appointed for a trial, the Freischöffen assembled — eight being necessary to legalize the proceedings — and the Freigraf ascended the seat of justice. Before him lay the sword, typifying with its blade supreme jurisdiction, and with its handle the cross of Christ; and beside it lay the withy or halter. As soon as the judge had announced that the court was open, a solemn silence prevailed, and the "peace of the court" was proclaimed three times. Then the judge turned to the assembled body and said, "I ask you, my brethren, if the hour has come in which I may judge the causes brought before the Holy Tribunal"; to which the members answered, "The time has come." The Freigraf then chose six other judges to sit with him, and the trial began. If the accused was one of the initiated, he could clear himself by swearing upon the cross-handle of the sword that he was innocent. This was the legal oath of purification. Having done this he took a Kruezpfennig, or cross-penny, threw it at the feet of the judge and went his way. Whoever molested him broke the king's peace. An outsider could not thus clear himself, but was judged according to the evidence.

Later in the history of the Vehm, this

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simple method of procedure was abandoned. The oath of the accused upon the sword was not final, but could be opposed and offset by the oaths of three witnesses. These three could in turn be offset by the accused bringing forward six witnesses in his favor; to counteract the effect of which the accuser needed fourteen, and if these were forthcoming, the prisoner required the testimony of no less than twenty-one to clear him. The sole manner of carrying out the death-sentence was, from first to last, by hanging.

The Vehmgericht saw its most powerful days from the twelfth to the fifteenth centuries. At various times it changed its methods somewhat, and it is said that at one period it held its meetings in dark and secret places. Later in its career abuses crept in, and it became a power that served for selfish ends. But it is generally agreed that in its best days it was composed of God-fearing, law-abiding men, and that it served a good purpose in the evolution of order out of the social chaos of feudal times. Its motto was "God, King, and Justice."

Remnants of the Vehmgericht were to be found as late as the opening of this century, for when the French occupied Westphalia in 1811, the body was sufficiently strong to warrant an official act of abolishment.

THE CONQUEST OF MAINE.

GEORGE J. VARNEY.

THOSE who have made themselves familiar with the planting of the colonies of Massachusetts and Maine, but have not followed further the history of the latter, must sometimes be at a loss to explain how Maine should ever have been a part of Massachusetts.

Even the grant to the Pilgrims of their places of settlement was obtained for them from the New England Company (of England) by Sir Ferdinando Gorges; to whom in 1622, the same company (of which he was a member) granted the territory since known as the Province of Maine. With it he subsequently received, by charter, unlimited rights of government, only in fief to the king. A governor was sent over by the proprietor —thus become lord palatine—in the following year; and in 1636 a court of justices was set up in the palatinate.

East of the Kennebec a large territory was assigned to the Duke of York, which, at the date of the settlement of Boston, contained about five hundred English inhabitants, having also a government of justices.

One cause of the hostility of the Bay Colony authorities to Sir Christopher Gardiner was the report that came from England that his mission to America was for the purpose of establishing Gorges' rights over a part of the territory contiguous to Massachusetts Bay. Yet Maine for more than one hundred and eighty years was in the jurisdiction of Massachusetts; for one hundred and forty-three years the portion from the Kennebec River westward, and for one hundred and thirty-four years the portion east of that river, were legally integral parts of Massachusetts. How did this come about?

Not long previous to 1639, Thomas Purchas, proprietor of the Pejepscot grant, assigned his territory to John Winthrop, governor of the Massachusetts Bay Colony, and conceded to its government the same exercise of power and jurisdiction as in its own charter limits. This territory, with that of Sir Alexander Rigby's Lygonia patent, was within the territory assigned to Sir Ferdi-

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nando Gorges in the earlier patent of Laconia.

In none of these were there any rights of government beyond what any proprietor under the king might exercise within his estate. Gorges, therefore, in 1639, obtained a charter which gave him rights of government within his entire territory, which, in this instrument, was re-named New Somerset. It extended from the Piscataqua River, on the south, to the Kennebec River, and from the sea to the interior indefinitely.

George Cleaves, and his associates of the Lygonia patent, submitted to the government which the lord-proprietor now established; while Purchas followed his custom of yielding quietly to "the powers that be."

The government of New Somersetshire, which had begun well, was not steadily sustained, so that in 1653 no fragment of it was to be found; and whatever government existed was from voluntary association. This condition, of course, permitted Cleaves to resume his sway in the Lygonia patent, and Purchas to settle back on his established relation with the Bay government.

So many disorders and grievances arose in and between the settlements under this system, that the larger number of settlers under the Gorges patent, by formal petition or otherwise, applied for admission to the charter privileges of the Bay Colony.

There were various reasons for which the Bay authorities desired to grant these requests; but they were puzzled in regard to the grounds for such action in a patent which they did not own, in a province which was under another charter. As their own charter was older by eleven years, they concluded that if it contained any provision whereby the Bay government could exercise authority under it in another patent without assignment to them of the latter, such provision might be made the warrant for exercising powers of government even in territory covered by another charter, if this had fallen into disuse.

The charter of the Massachusetts Bay Colony embraced all the lands "within the space of three English miles to the northward of the river Merrimack, and to the northward of any and every part thereof." All the length of this river known to the grantors of the charter lay in a nearly east and west direction, and the terms had been inconsiderately taken, they said, to mean that the line should run parallel to the stream; but it was now decided that the course of the river precluded that meaning, and that the parallelism should be with the equator, as a parallel of latitude.

A careful survey was now made for the true northern line of the charter; and the source of the river was on August 1, 1652, found to be 43° 40′ 12″ north latitude; and a line carried eastward from this intersected Casco Bay about midway between its northern and southern extremities. A re-survey, made in 1672, pushed the boundary five miles further north, so that its eastward extension took in all the coast settlements as far as the middle of Penobscot Bay; and this became the basis of the county of Devonshire, established by the Bay government in 1674. It covered, also, the grant of Charles II to the Duke of York. Accordingly it was now held that the Gorges charter was an infringement of their own, issued under a misapprehension of its real boundaries.

Courts under the Bay Colony's charter were instituted with much gladness of many in Maine as well as of the Bay people,— and with feeble protests only from Cleaves, at Casco Neck, and Edward Godfrey, at Agamenticus; the latter claiming to be governor, and himself with his council to be the rightful government in the Province of Maine, or County of Somerset.

In his second petition to the House of Commons for redress, however, Godfrey makes the admission that he is without authority,—as follows: "We beg leave also to state that divers inhabitants of this Prov-

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ince, by virtue of sundry patents and otherwise, have for these twenty years been under the power and guidance of Sir Ferdinando Gorges, who had these parts assigned to him for a Province. But he, being dead, and his son, by reason of heavy losses sustained, taking no care of our political welfare; and most of the charter Councillors, or Commissioners, having died or departed the Province, we were under the necessity of combining together for the purposes of government and self-protection, according to the laws of the realm. It is our humble prayer, therefore, that our confederative union may be confirmed." This petition is signed "Per me, Edward Godfrey, Gov., in behalf of the General Court" of New Somersetshire.

Sir Alexander Rigby, proprietor of the Lygonia patent, was also dead; and Cleaves, who occupied a position in its territory similar to that of Godfrey under Gorges, spent much time, at this period, in personal solicitation of the authorities in England against the action of the Bay government.

Three several times the latter sent commissioners to settle the government and to quiet the opposition in Maine; the first of these (1651) consisting of Simon Bradstreet, a venerable councillor; Daniel Dennison, commander-in-chief of the militia; and William Hawthorne, speaker of the House; a delegation of eminent dignity.

Before the close of 1652, a sufficient number of the inhabitants having subscribed to the jurisdiction of Massachusetts, the territory was formed into the county of Yorkshire, and courts established and proper officers appointed.

During the Protectorate of Cromwell settlements in the province of Maine increased, the settlers flourished, and all went well. Soon after the restoration a different influence reached America. Edward Gorges procured the assistance of Charles II for securing the restoration of the government of the Province to himself, now proprietor by inheritance; and the heirs of Rigby, also, began to obtain some advantages over the Bay government.

Before the overturn was wholly accomplished, however, a new element was introduced in the affairs of Maine. On March 12, 1664, the King granted to his brother, the Duke of York (later James II), besides territory on the Hudson, a large region east of the Kennebec, extending to the St. Croix. Col. Richard Nichols, commander of the force sent to dispossess the Dutch on the Hudson, was soon after sent to Maine, in association with Sir Robert Carr, George Cartwright and Samuel Maverick, commissioners, "to settle the controversies there, to hear all complaints, right all wrongs, and to regulate several other matters."

Instead of "settling" anything, they unsettled everything; "righting all wrongs" by ignoring all rights; for they transferred everything to the king or to the Duke of York,—so far as their term of office permitted. The Bay government in Maine was scarcely more disturbed than that of the other parties who had been attempting to maintain control.

The General Court, ignoring the governments of the king's commissioners, in May, 1665, passed an order to the effect that "a county court will be holden at York as in previous years; and all civil officers will continue to exercise and perform their duties; and the inhabitants will show, as formerly, due obedience to the colony administration." All this was done as ordered, except when the king's commissioners interposed their authority on the spot,—no force being used against them by the Bay authorities. The government under Rigby's patent was permanently ended, and that under the Gorges charter was not established, while the force of all patents within the Gorges charter was weakened. At the close of the year 1665, the official career of these commissioners was terminated, and they troubled the Bay government no more.

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During the next year a French and Indian war began, waged chiefly against New York. The king required Massachusetts to take the lead among the colonies for defense; and Nichols, the former chief commissioner, now governor of New York, showed the greatest anxiety for the speedy movement of her troops. This being the situation, the opponents of Massachusetts in Maine gained no attention.

The courts established by the king's commissioners were four, consisting of the General Assembly, Courts of Common Pleas, of Quarter Sessions, and single justice courts for the trial of causes under forty shillings by a jury of seven men. The first had sessions annually in May or June at Saco; the second, three times, and the third, four times a year in each division — at York and at Falmouth. Offenses were presented by grand juries, and facts determined by "juries of trials." The courts held at York were guided by the laws previously received from Massachusetts. The last General Assembly under the commissioners' government was held at Saco in May, 1668, — after which the people generally sought to be wholly restored to the jurisdiction of Massachusetts. Yet when Governor Bellingham commissioned Mr. Edward Tyng and captains Richard Waldron and Richard Pike to proceed to Yorkshire and re-establish the former courts, and to set affairs in order, Governor Nichols (June 12, 1668) wrote from New York to the Massachusetts executive and assistants inveighing against their action; but he was recalled to England within a few weeks.

The Bay Colony's commissioners were not delayed by the disapproval of their mission by Governor Nichols; and (except the last), accompanied by a mounted military escort, they arrived at York on the 6th of July, 1668. As in previous years, there were private conferences with the opposition officials, but this time to no effect. The latter were probably unaware of the departure of their supporter, and of the weakness of their cause in England.

On the morning of the 7th the Bay commissioners repaired to the meeting-house (which had served also as court-house) and opened a court by reading publicly their commissions and explaining the purpose of their presence. Their marshal was then ordered to make proclamation for the return of votes forwarded for associates and jurymen. Those of five towns were presented; and it was stated that another town had been interrupted while voting, and the meeting of still another wholly prevented by the king's justices.

While this canvass was in progress the justices approached the house and took position upon the steps at the door. One of them, who held a written paper, shouted into the court-room, "Let all here listen and attend to his Majesty's commands!"

The marshal, by order of the court, replied: "Whoever has a command from his Majesty, let him come forward and show it, and he shall be heard."

The justices then entered the house and exhibited the documents (which had been previously seen by the commissioners), and requested that they might be read in hearing of the assembly. The commissioners replied that the reading would be permitted if they would wait until afternoon; and the king's justices retired.

The court finished its examination of the votes, formed lists of the associates and constables, placed the jurors upon their panels, then adjourned to an afternoon hour.

It soon transpired that the deputies under the system of the king's commissioners had been summoned from the towns to assemble for this occasion; and while the Bay commissioners were absent the king's justices took possession of the house and seated their deputies. They then sent a message to the commissioners requesting an interview; to which they added the condescending statement, "It will be granted at this place."

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Their marshal then traversed the streets, proclaiming at the chief points: "Observe ye and obey the commands of his Majesty's justices."

"Whence," inquired one and another of the citizens and of the commissioners' escort, "Whence have you this authority? Show us your warrant, if you have any, for these commands, and distractions of the public peace."

"We proclaim according to the charge given us in the king's name," was the reply. "Our orders are our protection. We shall not show them. But we will say to all opposers, Beware of his Majesty's power."

This effort at intimidation was perceived to be impudently contemptuous of the authority of the Bay commissioners; who, having come upon the street, ordered their own county marshal to take the offenders into custody. The king's marshal and his company were accordingly placed under temporary arrest.

The commissioners then proceeded to the meeting-house, which they found full of people, and its seats occupied.

"Give place to the commissioners," commanded their marshal.

Approaching the justices, the commissioners addressed them to this effect: "You are the authors of an affront we little expected; but your course will avail you nothing. You might have called your meeting at another place and at another time. Depend upon this, — we shall not be deterred from executing any part of the delegated trust with which we are commissioned."

Instantly all was confusion; many sprang from their seats, and several attempted to speak. The commissioners commanded silence, and directed their marshal to clear the house.

The justices at once left their places, — one, as he went, advising his partisans to retire also. Probably he suspected that few of the large number present would prove adherents of the king's justices; for a previous experience at this place on a similar occasion must have been quite fresh in the memory of several.

This was, when, in 1653, the Bay government summoned the inhabitants of Agamenticus (re-named "York") to appear at an hour and place mentioned to receive the rights and immunities of the Bay government, Edward Godfrey (who had been chosen provisional governor some years previous) addressed the meeting in determined opposition to the proposed action. The discussion was prolonged until afternoon, when a formal vote was demanded, and a large majority was found to be against him. He then submitted, and took the oath of allegiance to Massachusetts with all the rest; and he is not known to have been again in opposition.

The "troop of horse," kept somewhere in the background by the Bay commissioners, may also have had its influence in the peaceable withdrawal of the king's justices.

Notwithstanding the affront they had given, the promise of a hearing was fulfilled; and the justices were permitted to be seated, while the commissioners on the judicial bench entered into conference with them. Their documents consisted of the king's mandamus — dated five years earlier, — Nichols' commission to the justices, and a letter from him. The first and second were read, but the letter was not admitted, being regarded as only private correspondence.

To these papers the commissioners replied: "We are commissioned to hold a court and settle the peace and order of the province. What we have begun, God willing, we shall finish. We are fully aware of the irregularities occasioned throughout these eastern towns and plantations, in 1665, by the king's commissioners; who were so bold as to charge Massachusetts with treachery and rebellion, and to threaten her, before the year's end, with the dread-

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ful retribution of our sovereign's severity. But through the divine assistance and his Majesty's power she yet possesses authority, by royal charter, to assert her right of government; and we fear not to compare her acts of justice and clemency with the words of those who can make words only their boast."

This speech completed the "Conquest of Maine," as it was somewhat humorously called in that period. Hostilities ceased then and there; and the commissioners went on and finished what they had begun, — from proclaiming the five associates (justices) elected, and qualifying the court officers and jurymen, to appointing town commissions, and forming the county militia in six companies (called train-bands), duly officered into a regiment.

All that remains to be mentioned of the triumphant commissioners is that they made their report to the General Court on October 23, following; when they received a vote of public thanks, and "ample pecuniary compensation for their services."

The further acquisitions of Massachusetts in Maine may be recited in brief space. The heir of lord-proprietor Gorges soon after the return of the king's commissioners to England began to make efforts for the restoration of his rights under the patent of the province of Maine, — which these royal agents had infringed upon more than the Bay government, having even attempted to sell lands. The House of Commons was besought to adjudicate on these claims; while the king was petitioned to forbid the intrusion of the Bay government. The proprietor was earnestly aided by the numerous enemies of the Massachusetts colony; and, in consequence, in the course of a few years, the Gorges claim gained a favorable decision; but before it was promulgated the Bay Colony's agents had purchased the patent of the Gorges family, — much to the king's chagrin. This was effected May 6, 1677; and the sum paid was twelve hundred and fifty pounds. Thenceforth there was none qualified to oppose the beneficent rule of Massachusetts in the province of Maine; and, gradually, by the force of conditions and events, that sway was extended to embrace the Puritan patent on the Kennebec, and beyond to the St. Georges River, where had been constituted the county of Devonshire; the control in the remaining patents and grants embracing the territory eastward to the St. Croix, being acquired by the new charter granted the Massachusetts Bay Colony in 1691, by William and Mary; which remained in force until the Revolution, — and, in fact, until the "separation" in 1820, when Maine became one of the sisterhood of States.

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THE MAN WITH THE IRON MASK.

JOHN ALBERT MACY.

DARK victim of the worst of dooms,
Against the blackest shades of ill
That ebon-veilèd visage looms,
A deeper, blacker shadow still.

Mere figure where a man had stood;
The right of self forever lost;
Unseen the looks, or ill or good,
That o'er his shrouded features crossed.

God grant — 'tis all the prayer I ask —
That human souls, some time, somewhere,
May strip away the iron mask
That Earth has doomed us all to wear.

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THE NEW YORK BAR ASSOCIATION.

A FRENCH king, being asked substantially the same question which the great legal poet, Sir William Jones, in one of his odes put and answered in verse, "What constitutes a state?" answered with true Bourbon conceit, "*L'état c'est moi.*" Any lawyer standing in the center of the almost matchless law library in the newly dedicated building of the New York Bar Association, and putting the question, "Who most constituted this library?" would receive as answer from any member, "Why, Wm. J. C. Berry, who for the last twenty-seven years of the existence of our Bar Association has been our librarian" — himself a graduate of the Columbia Law School, and who had previously been head clerk and salesman and student of law-books, while a youth, in the once notable law-book emporium of John S. Voorhies. Berry was what ladies name "an object of interest" on the evening of October eighth, when the magnificent clubhouse of the Bar Association was dedicated by a social reception, assisted in by a thousand lawyers and as many guests of laymen and lay-ladies.

I have advisedly used the word "magnificent" as applied both to the exterior and interior of the new edifice that fronts properly on West 44th St., between aristocratic Fifth Avenue and democratic Sixth Avenue, and backs two hundred feet to its members' entrance in the rear on West 43d St., where for neighbors it has the staid Century Club, a medical club, The Howard Club, and the sportive Racket Club, thus constituting that thoroughfare what Pall Mall in London is — par excellence a club street.

The Lord Chief Justice of England, unable to remain in this country for the opening dedication of the building, was, on the day preceding his sailing for home, conducted over the fully furnished building, and from his lips fell again and again the word of description that I have used — "magnificent." He added that it was a subject for his wonder, when he learned that the cost of the ground, building, library, and furniture, which approached one hundred and fifty thousand English pounds, or three quarters of a million of dollars, had been raised by members of the New York Bar in their private capacity.

Let us examine what it was that invited the observation of the admiring Lord Chief Justice, who doubtless recalled the shabby quarters of the Solicitors' Club rooms on Chancery Lane in London, or the homes of its Inns of Court that, although rich in memories and historic glamor, showed no such union of luxury, comfort and incentives or aids to professional work as he found in the Bar Association building.

Upon entering he had surveyed the white marble frontage, planned by the world-renowned architect, Eidlitz, in impressive architectural composite work, constituting a rare union of dignity and beauty of façade. When the Lord Chief Justice passed up the outer granite steps, he entered, between marble pillars of Grecian-Doric school and marble wainscoting, into a long, wide corridor of lofty ceilings, opening a *coup d'œil* of a nave two hundred feet long, exposing bays, a mosaic tiled floor, dazzling walls, and a procession of Ionic pillars or columns of the choicest Numidian marble, transported over ten thousand miles. He also glanced down marble stairways that led into a basement in which were the offices, smoking-rooms, kitchen, and electric plant for supplying the eleven hundred carbon burners throughout the four stories of the edifice. Passing through this entrance-nave he saw, on either side, convenient and tastefully upholstered and furnished retiring chambers for officers of the Association, an expensive cloak-room paneled in richest oak, and a reception room palatial in appointments. He saw the latest

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NEW YORK BAR ASSOCIATION BUILDING.

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form of elevator — or as his countrymen term it, lift — capable of accommodating fifteen skyward travelers at one time, and surrounded with iron scroll work of exquisite design. Preferring however to ascend by one of the marble staircases, he observed lintels and wall and balustrade facings of polished Siena marble, veined in red and blue and polished almost to look like mirrors. He passed upward with a wide window of plate glass at his side affording the best of legal light, and next found himself in a second nave with practically again a building on each side. Floor-tiles, bays, and Ionic marble pillars exactly as below. Toilet conveniences on one side and more small retiring rooms; and on the other side the reading-room and three spacious rooms devoted to miscellaneous reference books and to law-treatises published in every foreign tongue — perhaps two thousand volumes in number, and contained in scattered low-crowned single bookcases. Above these, on the walls, oil paintings of ex-presidents of the Association and celebrated jurists and lawyers — the gifts from time to time of individual members — and also prints of others. There, a fine life-size crayon of Justice Samuel Nelson in his judicial robes looks around a corner at the oil painting of Thomas Addis Emmet that was reproduced by engraving in the August GREEN BAG, and Ambrose Spencer's portrait sheds his benignant smile. James T. Brady's massive head and very oratorical face and pose of figure remind veteran members of his jury prowess in days gone by. Horace Binney's engraved picture suggests legal "Brotherly Love." Engravings of assembled courts in Great Britain, at Washington, or in State capitals, are also to be inspected. "In time," says Librarian Berry to the Lord Chief Justice, "this building will become a national portrait-gallery of distinguished jurists in a sort of Apostolic succession."

Upon the next floor the distinguished visitor is shown into a large front chamber containing a score of several-shelved book-racks devoted to volumes not much sought after, and bound volumes of briefs in the United States Supreme Court, the Court of Appeals, and Appellate divisions of the State Supreme Court. But the third floor — removed from the hum and roar of the street in a city that has won the sobriquet of "the City of Noises" — is to be found the *pièce de résistance:* for the frontage on 44th Street is devoted to library accommodation, while that on 43d Street is assigned to the assembly room of the Bar Association, with its official platform and upholstery confronted by fifteen hundred comfortable stall-chairs, in rows, upon a floor capable of containing many more chairs when desired.

Standing near the extreme front of the library, just where the main aisle is crossed by an intersecting bay-aisle seventy-five feet in length, a climax of astonishment strikes upon the brain of the Lord Chief Justice as he views the wealth of law-books, equal in number of volumes to the possessions of all the libraries of the two Temple Inns, Lincoln's and Gray's Inns, when aggregated; and larger than the law library of Congress, which he had been shown on his recent visit to Washington. He sees also at the entrance aisle six double rows of long oaken desks with twenty-four comfortable cane upholstered chairs, and above each an electric light: all for the convenience of members in their library work.

The Lord Chief Justice next walks through and around the alcoves and finds, on shelves, statutes and reports classified country by country and state by state, and every known legal treatise or bound legal periodical, all arranged alphabetically by author's name. Asking how many volumes are within the walls, Librarian Berry answers: "In exact numbers, 569 less than 50,000."

The catalogue is produced: in two volumes and numbering together a few less than a thousand printed pages; but each interleaved with blank paper on which are written in red ink additions made from time to time. In

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THE ENTRANCE HALL.

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one volume the arrangement is by authorship or by the name belonging to statutes and reports, and in the other volume, arrangement is by subjects.

Berry did not go farther, as he might truly have done, and told how, to a large extent, he could with a lawyer's trained reference memory quote volumes and pages for many a remarkable legal doctrine or *cause célèbre*. Indeed I have heard my late law partner, a charter member of the Association, Aaron J. Vanderpoel, substantially remark, often when some new law-point arose, or some doctrine was oddly differentiated in a pending matter, he, previous to roaming among probable volumes, had tapped Berry's suggestive memory and found it a valuable beacon to a path of precedent in the matter.

Inasmuch as the business affairs of clients ramify themselves into every portion of the globe, it is necessary for the American lawyer to be able to find references to foreign statutes, decisions, usages and customs. He, whether a member of the Bar Association or its guest from a distance, will not be at a loss in this library to find in such respect whatsoever book he wishes. The law-treatises and the statutes or laws of every civilized country have been placed upon its shelves. Those books which are comparatively obsolete or superseded are also on shelves for the tracing of legal evolution. The volumes, for instance, collected under *verbo* India are many and odd in title and treatment. Copies of all our treaties are here, opinions of attorney-generals also. Lawyers baffled in the Congressional library over mooted points have solved them in this library. Berry has often been called upon to answer inquiries from lawyers at a distance respecting references; and in his desk at the east end of the library-room are on file letters from eminent jurists asking information as to volumes and cases.

Much of the anxiety, worry, and systematic arrangement for the recent house-warming had fallen upon Sidney Smith, of the historic firm of Martin and Smith, who is treasurer; and perhaps to his taste is largely due the harmonious selection of the exquisite upholstery throughout the edifice, and the choice of carpets — a taste inherited from his mother, a Knickerbocker belle in former days, of social fame and refinement. Doubtless many of the ladies who graced the house-warming reception on the evening of the eighth of October ultimo marveled at the taste displayed by a mere man in the decorations and internal arrangements of the entire building.

This reception was a social event fairly inaugurating the fashionable New York season of 1896-7. Flora had associated herself with Themis in massing roses, pinks, violets and newborn chrysanthemums in all the corridors and rooms, and in embracing polished pillars and book-shelves with smilax. Brilliant toilettes had produced memories of grace and beauty for future gatherings of lawyers, and even amid their ponderings over dry library books. Tennyson's "rosebud garden of girls" was seen in every portion of the legal palace; and music came to fasten melodies upon rafters and frescoed ceilings to be recalled in future days and evenings. Wives, sisters and sweethearts might hereafter banish any regrets at the absence of lawyer husband or brother or lover who had gone to the Bar Association club-house: because each knew that therein his lines must fall in pleasant places. The ladies were told how and why Coke upon Lyttleton was a phrase only used nowadays by novelists; Gould on Kent or "Browne's Domestic Relations," or "Jones on Pledges," were more in vogue as titles of modern treatises in jurisprudence than Coke upon Lyttleton or Fearne on Contingent Remainders. And when the ladies demurely asked of their legal escorts whether legal science was not confusing, they were shown, for affirmative answer, Beach on the "Modern Law of Contracts" of 3,000 pages, containing 26,000 cases examined, cited and reviewed. Not a few ladies shuddered when, passing through

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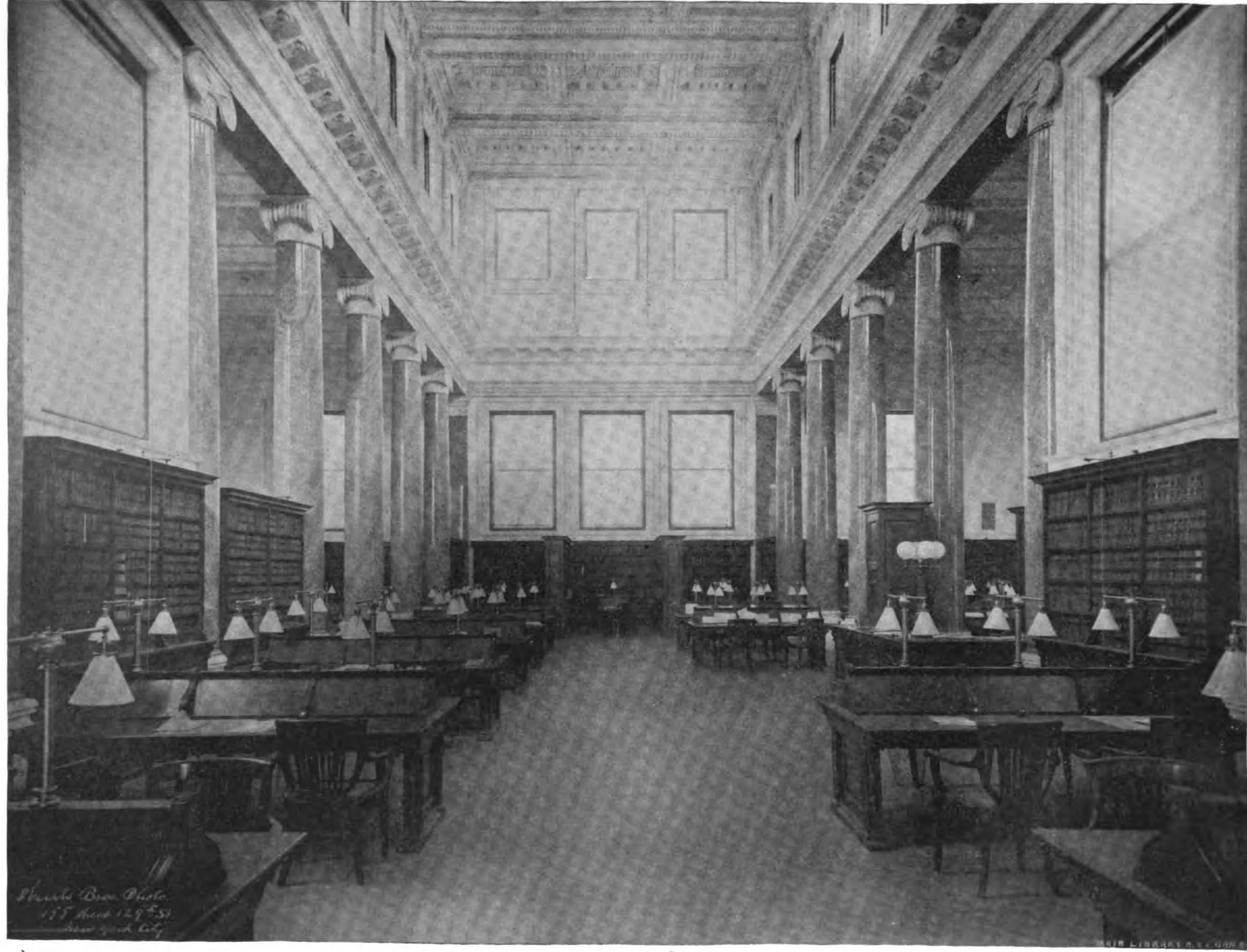

MAIN LIBRARY.

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the library, they read on the back of a volume, "Bishop on Marriage and Divorce," and while cognizant of the relation of a bishop towards marriage, they marveled as to what a bishop had to do with divorce. Nor did they address their marvel to Lord Bishop Dowden of Edinburgh, who was a notable guest of the evening; nor to Chief-Justice Fuller, nor ex-Ambassador Phelps, nor the redoubtable Doctor Parkhurst, who were also among the evening visitors.

The lady guests lingered around the oil portraits of ex-presidents. They were impressed with the gravity of William M. Evarts, its first executive; with the clerical look of Stephen P. Nash, who rightfully came by it as the standing counsel, through half a century, of Trinity Church; with the smiling face of Francis N. Bangs, prematurely taken away by fell disease; with the encyclopædic countenance of James C. Carter, who had flung respectful defiance in the faces of the Supreme Court judges when fighting for the income tax; with the poetic face of William Allen Butler (author of the ladies' favorite poem, "Nothing to Wear") and whose facial resemblance to his father Benjamin F. Butler, the great New York reviser, when the latter's portrait, framed on the walls of another room, was compared with that of the son; with the conundrum-like features of Joseph H. Choate; with the Parisian look of Frederick R. Coudert; with the stern, implacable face of Wheeler H. Peckham: all consecutively successors of Evarts. By and by the portrait of the present president, Joseph Larocque, will be added to the gallery.

I do not know how other guests of the evening felt among the legal throng, but I seemed to feel around me the spiritual presence of such departed old members as the logical John K. Porter, the dogmatic but learned Edwards Pierrepont, the courtier-like Edwin W. Stoughton, the earnest and eclectic Clarkson N. Potter, the affectionate Vanderpoel, and the Justinian-like David Dudley Field; all of whom, as foundation members of the Bar Association, had done so much to build it up toward its present grandeur and influence.

Almost the cynosures of all attention on this evening were ex-Chief-Justice Noah Davis, — benignly dignified, conversationally attractive, and magnetic in presence, — and ex-Chief-Justice Charles P. Daly, sententious and learned in many sciences; who each, by an absurd age-provision of the State Constitution, had in the plenitude of mental vigor been removed from a Bench which for several decades they had adorned and made illustrious.

Many, when walking through the (I was about to write crowd — but the size of the building does not admit of the word — and so I substitute) throngs and groups remarked upon the second and third generations of lawyers that night represented. Sons of Evarts, of Gerard, of Vanderpoel, of Peckham (son of the elder Judge Rufus W.), of Judge Rapallo, of George J. Cornell, the grandson of Chief-Justice Hornblower — William B., a vice-president of the Association — of the brothers Augustus F. and Delafield Smith, and of at least a score of others, whose baby playthings were their fathers' law books in place of blocks for castle-building.

Seldom has there been a social function so successful in New York City as this late reception in the marble palace of the Bar Association. It goes into New York's local history along with the Dickens ball during the forties, with the Kossuth dinner in 1857, with the ball to the Prince of Wales in 1860, and with the reception by Sorosis of many distinguished authoresses and women of mark.

Divinity was at the Bar Association reception to give its blessing; Medicine, to predict health to the Association; and Justice — her eye unbandaged for the occasion — to smile upon her beloved legal disciples.

This Bar Association, inaugurated in December, 1869, under the committee au-

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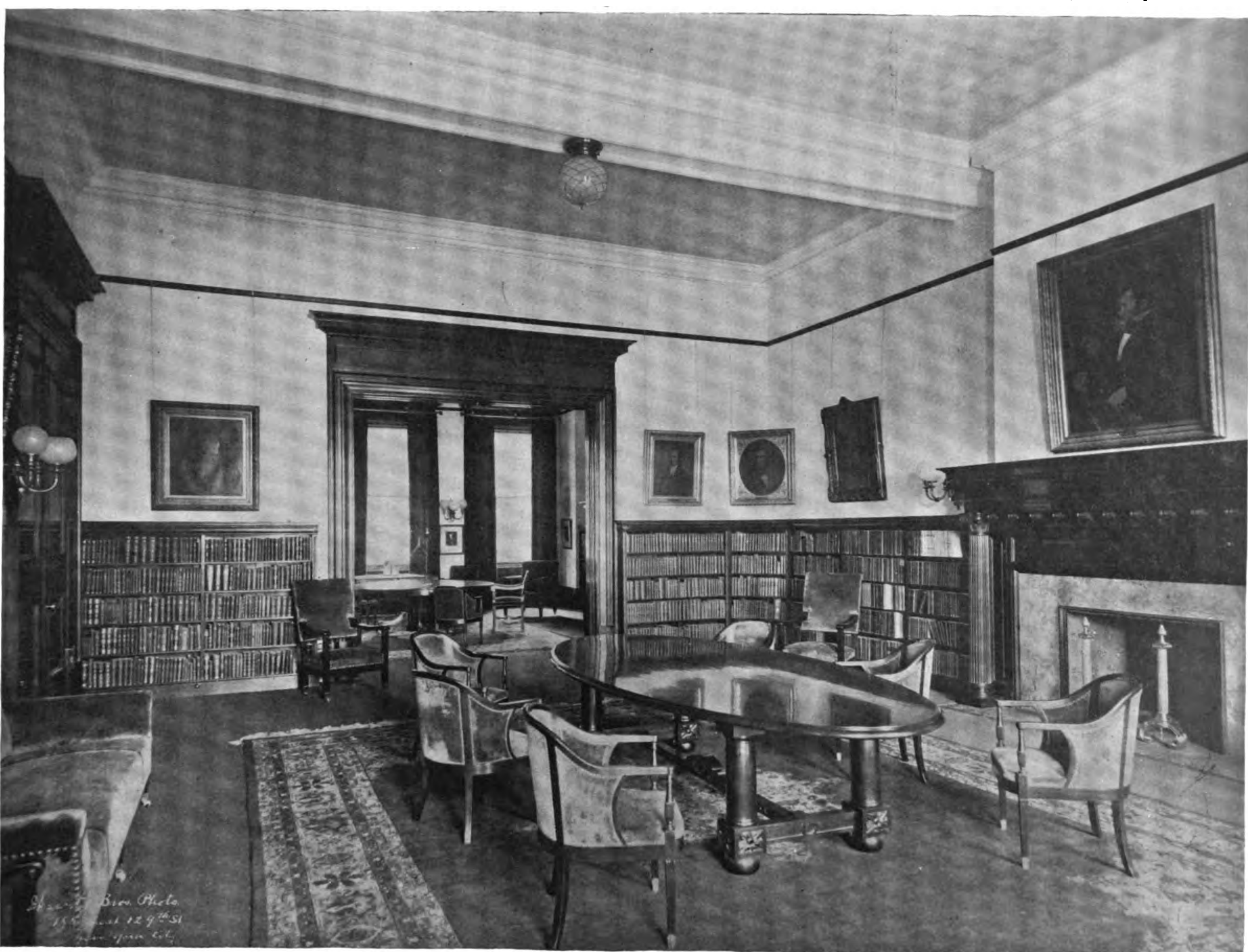

FOREIGN LIBRARY.

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spices of Albert Mathews — now retired and indulging in literary pursuits as father-in-law of Mrs. Cornelius Vanderbilt — James C. Carter, and the late Edmund Randolph Robinson — was chartered in the following April, since which time it has been a great power. It has impeached bad judges, has beaten at the polls disfavored candidates for the Bench, and has kept for a quarter-century judicious ward over the best legal interests of the community and interests of their outside comradeship of the Bar. It has watched mischiefs in procedures capable of being cured by remedial statutes, and has prepared and influenced their passage. Moreover, it has been free from cliques or selfish endeavors; and now is about to usher in the new century, stronger, more popular, and more influential than heretofore. At the supper, which closed the reception, all heartily drank to the long life of the New York Bar Association.

CONTRASTS IN COURT.

By Wendell P. Stafford.

THIS advocate, in confidence so weak
He scarce can muster breath enough to speak,
And gets each sentence by a painful wrench,
Wears in his hat more wit than half the Bench.

This other, self-assertive, shallow, loud,
Would still harangue his judges like a crowd,
Though Cicero himself were seated there
In full robed splendor in his ivory chair.

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A CURIOUS CASE.

THE motives inciting crime are, as shown by judicial annals, many and varied; but among them none more incomprehensible can be found, than that which urges a man weary of life to commit a capital offense solely for the purpose of perishing by the hand of the law, thereby avoiding incurring the guilt of suicide. Such instances have been known. Among them the following case, which occurred in Philadelphia in 1760.

Captain Bruluman had been brought up a silversmith, a business he left to enter the army, where he became an officer in the Royal American regiment, but was degraded for being detected in counterfeiting or uttering base money. He then returned to Philadelphia, and growing insupportable to himself, and yet unwilling to put an end to his own life, he determined upon the commission of some murder, for which he would be hanged by the law. Having formed this design, he loaded his gun with a brace of balls, and asked his landlord to go out a-shooting with him, intending to slay him before his return; but the lucky landlord, being particularly engaged at home, escaped the danger. He then went out alone, and on his way met a man whom he was about to kill, but recollecting that there were no witnesses to prove him guilty, he suffered the person to pass. Afterwards going to a tavern, in the tap he drank some liquor, and hearing people playing at billiards in a room above that in which he sat, he went upstairs, and entered into conversation with the players, in apparent good humor.

In a little time he called the landlord, and desired him to hang up his gun. Mr. Scull, a party engaged in the game, having struck his antagonist's ball into one of the pockets, Bruluman said to him, "Sir, you are a good marksman; now I'll show you a fine stroke." He immediately took his gun, levelled it, deliberately took aim at Mr. Scull (who imagined him in jest), and shot both the balls through his body. He then went up to the dying man, who was still sensible, and said to him, "Sir, I have no malice or ill-will against you; I never saw you before; but I was determined to kill somebody, that I might be hanged, and you happen to be the man; and I am sorry for your misfortune." Mr. Scull had just time left in this world to send for his friends and make his will. He forgave his murderer, and, if it could be done, desired he might be pardoned. Bruluman died on the gallows, exulting in the success of a scheme by which he deemed him self not guilty of his own death, though he effectually shortened his own life.

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THE ENGLISH LAW COURTS.

X.

MISCELLANEOUS.

UNDER this head we propose to include a number of courts and jurisdictions too important to be passed over altogether, yet not sufficiently so to stand in need of separate treatment.

LUNACY OFFICES.

The jurisdiction over lunatics is exercised in three different offices: (1) that of the Masters; (2) that of the Commissioners in Lunacy; (3) that of the Chancery Visitors.

(1.) The Masters in Lunacy are two barristers, each of not less than ten years' standing, and enjoying a salary of £2000 a year. They try inquisitions *de lunatico inquirendo* with or without a jury, according to circumstances, and exercise, under recent acts, most of the powers of the Judge in Lunacy in regard to the administration of lunatics' estates. The most famous of the Masters was Samuel Warren, Q. C., the author of "Ten Thousand a Year" and "The Diary of a late Physician." He presided over the famous Windham inquiry in 1862. The present Masters are Mr. Bulwer, Q. C., who tried the Cathcart case, — reported in its legal aspects in 1892, 2 Chancery, 549, — and Mr. F. Maclean, Q. C., who has had no opportunity of showing his quality, except in a painful case where a clergyman of the Church of England was held to be a lunatic (the Tollemache inquiry).

(2.) The Commissioners in Lunacy are charged with the duties of seeing that the provisions of the Lunacy Acts in regard to asylums, etc., are complied with, and of renewing licenses. Besides a number of unpaid commissioners, there are six paid members of the board — three medical and three legal (barristers of not less than five years' standing — appointed and removable by the Lord Chancellor, and receiving each a salary of £1500 a year exclusive of expenses). The Commissioners visit the asylums periodically, "hunting in couples," one legal and one medical. But the Lunacy Acts contain provisions for special visits at any time. There is a secretary to the Lunacy Commission — a barrister of not less than seven years' standing — appointed by the Commissioners with the approbation of the Lord Chancellor, and having a salary of £800 a year. The secretary has also practically the first vacant commissionership in reversion.

(3.) The Chancery Visitors have as their chief duty the visitation of lunatics "so found by inquisition." One of the Visitors is a medical man and another a barrister (qualification, five years' standing). They are appointed and removable by the Lord Chancellor, and receive each a salary of £1500 a year exclusive of expenses.

Various suggestions for the amalgamation of these offices have been made, and it may not improbably be effected during the present administration.

VARIOUS INFERIOR COURTS.

In addition to county courts, certain cities and boroughs have attached to them inferior courts of record, having power by ancient charters to exercise jurisdiction in certain suits. Of these the chief are the Mayor's Court of London (special act 21 and 22 Vict., ch. 57); the Liverpool Court of Passage (several special acts); the Salford Hundred Court of Record (special act 31 and 32 Vict., ch. 130); the Oxford University Chancellor's Court (special act 25 and 26 Vict., ch. 26). Other inferior courts of record which have no special acts governing their procedure are the Bristol Tolzie and

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Pie Poudre Court, Derby Court of Record, Exeter Provost Court, Kingston-upon-Hull Court, Newark Court of Record, Northampton Borough Court, Norwich Guildhall Court, Peterborough Court of Common Pleas, Preston Court of Pleas, Romsey Court of Pleas, Southwark Court of Record, Worcester City Court of Pleas.

ELECTION PETITIONS.

Prior to 1868 election petitions were tried before committees of the House of Commons. The impartiality of these bodies was felt to be not above suspicion, and it was considered desirable by the government of the day to create a fresh tribunal for the trial of cases in which political issues of so lively and important a character were involved. Accordingly a bill was introduced providing that "election petitions should in future be presented in the Court of Queen's Bench, and having been so presented, should be tried by one of the judges of the superior courts, without a jury, in the borough or county, as the case might be, to which the petition related." On Jan. 31, 1868, Lord Chancellor Chelmsford sent a copy of the bill to Chief-Justice Cockburn with a request that he would consult the judges as to "the best mode of providing assistance for the event of a general election, and the influx of petitions which always follows." To this letter Cockburn, on the sixth of February following, wrote a reply in which he conveyed to the Chancellor, in the name of the judges, "their strong and unanimous feeling of insuperable repugnance to having these new and objectionable duties thrust upon them." The reasons for this repugnance were practically three in number. They cannot be better stated than in the language of the Chief-Justice himself:

(1.) "The inevitable consequences of putting judges to try election petitions will be to lower and degrade the judicial office, and to destroy, or at all events materially impair the confidence of the public in the thorough impartiality and inflexible integrity of the judges when in the course of their ordinary duties political matters come incidentally before them. . . . This confidence will speedily be destroyed if, after the heat and excitement of a contested election, a judge is to proceed to the scene of the recent conflict while men's passions are still 'roused, and in the midst of eager and violent partisans, is to go into all the details of electioneering practices and to decide on questions of general or individual corruption, not unfrequently supported or resisted by evidence of the most questionable character. The decision of the judge given under such circumstances will too often fail to secure the respect which judicial decisions command on other occasions. Angry and excited partisans will not be unlikely to question the motives which have led to the judgment. Their sentiments may be echoed by the press. Such is the influence of party conflict, that it is apt to inspire distrust and dislike of whatever interferes with party objects and party triumphs. Can it be expected that, if brought into contact with these strong prejudices and passions, the judicial office will not suffer in the public esteem? that its dignity will not be lowered, and the veneration which has hitherto attached to it be materially diminished? . . . . ."

(2.) "In the next place it is to be observed that the functions which the judges are called upon to discharge are altogether beyond the scope of the duties which on accepting the office of judges we took on ourselves to fulfill. We are at a loss to see how Parliament can with justice or propriety impose on us labors wholly beyond the sphere of our constitutional duties, and which no one ever contemplated the possibility of our being called upon to perform."

(3.) "I have further to point out that we are thoroughly satisfied that the proposed scheme is impracticable, and that the performance by the judges of the onerous duties which this bill proposes to cast on

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them is neither more nor less than a sheer impossibility. . . . The time of the judges is known to be more than fully occupied. Attention has been of late directed towards devising means for relieving them from a portion of their labors, so as to enable them, without the addition of more judges, to perform their more important duties without the delays which the accumulation of unavoidable arrears entails upon suitors. Whether even this will be accomplished remains extremely doubtful. Can it be wise under such circumstances to scatter the judges over the country to try election petitions? We would venture to ask which court is to be suspended in order to furnish judges even for occasional petitions, to say nothing of the trial of petitions after a general election, when, if any material portion of the work of trying petitions is to be done by the judges, Westminster Hall would have to be shut up altogether? Assuming even that a judge or two could be spared in term-time, . . . what is to be done after term? Are the sittings in error or the post-terminal sittings of the different courts to be suspended, or the *nisi prius* trials to be put off? And what as regards the circuits? Is a judge to set aside Her Majesty's commission and leave the gaols undelivered and cases untried while he is occupied in investigating the unclean doings of a corrupt borough?"

In conclusion Sir Alexander Cockburn suggested the appointment of a commission of barristers in lieu of the judges. "Everyone knows," he said, "that owing to the accidents which determine professional success and business at the Bar, there are always a certain number of counsel whose business is not proportioned to their known abilities and learning and whose sound judgment and judicial aptitude are recognized by the references which are frequently submitted to them as arbitrators. Many of these would probably be willing to undertake the employment in question, and it might safely and conveniently be entrusted to them; while to put such duties upon the judges would be a most fatal mistake."

At first the government seemed disposed to accept Sir Alexander Cockburn's suggestion, and a new tribunal, consisting of three legal commissioners, each with a salary of £2000 a year, was to have been constituted for the trial of election petitions and the hearing of appeals from the Revising Barristers who preside over the adjustment of the lists of parliamentary voters. But other counsels ultimately prevailed, and Mr. Disraeli's "Hustings Court," as it was contemptuously styled by some of his political opponents, was established pretty much in its original form. It cannot be said that the Lord Chief-Justice's ominous prophecies have been fulfilled. No imputation has ever been cast on the impartiality of the Elections Petitions Judges; and serious as is the present delay in the disposal of litigious business in England, no portion of it can with any pretense to fairness be attributed to the act of 1868. The principle of giving the judicature control over the corrupt or *ultra vires* conduct of political organizations and municipal bodies is familiar to all citizens of the United States, and has in recent years received some remarkable extensions in England. Of this tendency the Parnell Commission is the most glaring and the most questionable example. Curiously enough, Sir Alexander Cockburn's arguments have in the present year been borrowed — without acknowledgment — by the opponents of Mr. Balfour's Local Government Bill for Ireland.

THE PATENT OFFICE.

Under the early procedure for taking out letters patent for inventions, there were six offices through which an application for a patent passed before the grant was issued under the great seal. The policy of this multiplication of offices is thus stated by Lord Coke: "Such was the wisdom of prudent antiquity that whatsoever should pass the great seal should come through so many hands to the

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end that nothing should pass the great seal, that is so highly esteemed and accounted of in law, that was against law or inconvenient, or that anything should pass from the King any ways, which he intended not, by undue and surreptitious means." This reasoning obviously lost its force however when letters patent came to be granted at the peril of the grantee, and when after the introduction of the practice of enrolling a specification, the patentee was judged upon his own deed; but the number of offices was not reduced till the Patent Law Amendment Act of 1852, and these offices seem largely to have existed for the purpose of extracting fees from the patentee at various stages. Under that statute they were reduced to the office of the Commissioners of Patents, in which all proceedings took place. When the Patent Act, 1883, which invests the Patent Office with some of the functions of a legal tribunal, passed into law, a joint committee was appointed by the Board of Trade and the Treasury to advise as to the reconstitution of the office of the Commissioner of Patents and as to the formation of a properly qualified staff of examiners. The recommendations of the committee having been generally approved, the requisite staff was appointed and the Patent Office was opened to the public at ten A. M., on Jan. 1, 1884.

There were numerous competitors for the honor of being the first applicant under the new act. Number one was eventually obtained by a Scotchman who came from Glasgow, and arrived at the Patent Office over night. The whole office is under the control of the Comptroller General of Patents (Sir Henry Reader Lack), subject to the Board of Trade, and there is a large staff of examiners who perform the examining functions of the office.

In addition to the printed specifications of British and foreign patents, the Patent Office Library contains the best collection of works relating to the applied sciences at present accessible to the general public, and is specially rich in foreign technical and periodical literature.

The practical working of the Patent Office and the points at which it acts as a Court of Law will be best illustrated by a brief outline of the procedure to obtain a patent. An application for a patent must be made in the form prescribed by the act of 1883, and must be left at or sent by post to the Patent Office. This application must contain a declaration that the applicant is in possession of an invention whereof he, or, in the case of a joint application, one or more of the applicants, is the true and first inventor, and must be accompanied by either a provisional or a complete specification. The provisional specification describes "the nature of the invention," and must be accompanied by drawings if required. The complete specification must "particularly describe and ascertain the nature of the invention, and in what manner it is to be performed," and must also, if required, be accompanied by drawings. A specification, whether provisional or complete, must commence with the *title* of the invention, and in the case of a complete specification must end with a distinct statement of the invention claimed. The same drawings may accompany both specifications. The Comptroller refers every application to an examiner, whose duty it is to ascertain and report whether the nature of the invention has been fairly described and the application, specification and drawings, if any, have been prepared in the prescribed manner, and the title sufficiently indicates the subject-matter of the invention. If the examiner reports adversely to the applicant on any one of these points the Comptroller may refuse to accept the application, or require the application, specification or drawings to be amended before proceeding further, and in the latter case the application, if the Comptroller so directs, may bear date as from the time when his requirement was complied with. An applicant may appeal from the Comptroller, refusing to accept an application or requiring an

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amendment, to the Law Officer, i. e. the Attorney or Solicitor-General, and the Law Officer hears the applicant and the Comptroller and makes an order determining whether, and subject to what conditions, if any, the application is to be accepted. Upon the acceptance of the application the Comptroller gives notice to the applicant. If after an application has been made, but before the patent thereon has been sealed, another application for a patent is made, accompanied by a specification bearing the same or a similar title, the Comptroller, if he thinks fit, on the request of the second applicant or his legal representative, may within two months of the grant of a patent on the first application either decline to proceed with the second or allow the surrender of the patent granted thereon.

An applicant whose invention is sufficiently matured, may deliver a complete specification in the first instance, i. e. along with his application. The advantages of this provision are that a patent can be taken out more quickly and at less expense, and that the applicant is at once secured against infringers. But this course ought only to be followed when the invention has been perfected. If the applicant does not leave a complete specification with his application, he may leave it at any subsequent time within nine, or, if the Comptroller grant him an extension, ten months thereafter. Unless a complete specification is left within the prescribed time, the application is deemed to be abandoned. When a complete specification is left after a provisional, the Comptroller refers both to an examiner for the purpose of ascertaining whether the complete specification has been prepared in the prescribed manner and whether the invention particularly described therein is substantially the same as that described in the provisional specification. If the examiner report against the applicant the consequences above noted in connection with provisional specifications again follow. Unless a complete specification is accepted within twelve, or, by leave of the Comptroller, fifteen months from the date of the application, it becomes void. The reports of the examiners are not in any case published or open to public inspection, and are not liable to production or inspection in any legal proceedings, unless the court or officer having power to order discovery in such proceedings, certify that it is desirable in the interests of justice, and ought to be allowed.

On the acceptance of the complete specification the Comptroller advertises the fact, and the application and specification, or specifications, with drawings, if any, are then for the first time open to public inspection. Any person may at any time within two months from the date of the advertisement of the acceptance of a complete specification give notice at the Patent Office of opposition to the grant on the ground (*a*) of the applicant having obtained the invention from him or from a person of whom he is the legal representative, or (*b*) that the invention has been patented on an application of prior date, or (*c*) on the ground that the complete specification describes or claims an invention other than that described and claimed in the provisional, and that such other invention forms the subject of an application made by the opponent in the interval between the leaving of the provisional and of the complete specification, but on no other grounds. Where such notice is given, the Comptroller notifies the opposition and other applicant, and then on the expiring of the two months above referred to hears the applicant and the opponent, who must be a person interested in the grant which he is opposing, and decides between them, subject to an appeal to the Law Officer. The parties both before the Comptroller may be represented by patent agents or by counsel, who in such cases may accept instruction from patent agents direct without the intervention of a solicitor. The Law Officer is also enabled to obtain, if he think fit, the assistance of

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an expert, and to fix his remuneration, with the consent of the Treasury. If there is no opposition, or, in case of opposition, if the decision is in favor of the applicant, the Comptroller causes letters patent to issue under the seal of the Patent Office. No proceedings for the infringement or revocation of a patent once issued can be taken in the Patent Office, or it may be added, in the county courts.

Patent practice is in England one of the most, perhaps we might say without exaggeration the most lucrative branch of legal business. Among the leading patent experts at the bar were Sir Richard Webster (while he was in general practice), Mr. Fletcher Moulton, Q. C., Mr. Lewis Edmunds, Q. C., who recently attained the almost unique distinction of taking "silk" at the age of thirty-five, and Mr. Roger Wallace.

The Patent Office is also the headquarters of designs and trade-mark business, and similar rules of procedure to those just described apply to these branches of industrial property, except that the appeal from the Patent Office is not to the Law Officer, but to the Board of Trade, who may, and frequently do, refer it to the High Court.

In recent years there has been a movement in England in favor of the naturalization here of some form of the preliminary examination into the novelty of patents prevailing in America. But as yet nothing practical has come of it.

THE COUNTY PALATINE COURTS.

Three English counties have had Palatine Courts: Chester, Durham and Lancaster. Of these the first two were created by immemorial usage, the last by Edward III. The County Palatine of Chester was abolished by the statute 11 George IV and 1 William IV, ch. 70. The Judicature Act of 1873 transferred to the High Court of Justice the jurisdictions of the Court of Common Pleas at Lancaster and the Court of Pleas at Durham. But the equity sides of those Palatine Courts were retained and are now regulated by various statutes which closely assimilate their procedure to that of the Chancery Division. The judge of the Lancaster court is styled Vice-Chancellor, and appeals lie from his decisions to the Court of Appeal. The office of Vice-Chancellor of the Palatine Court of Lancaster, which has attached to it a salary of £3500 a year, has recently been vacant. It was conferred by Lord James of Hereford, the present Chancellor of the duchy of Lancaster, on Mr. Samuel Hall, Q. C., formerly the Attorney-General of the duchy.

THE STANNARY COURTS.

The "tinners" of Devonshire and Cornwall are provided with local tribunals called the Stannary Courts—of the same limited jurisdiction as those of the Counties Palatine, "in order that they may not be drawn from their business, which is highly profitable to the public, by following their law-suits in other courts." The judge of these courts is styled a Vice-Warden, and an appeal formerly lay from his decisions to the Lord Warden, and finally to the Privy Council. But the Judicature Act of 1873 transferred all the jurisdiction of the Lord Warden to the Court of Appeal.

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THE GAME OF POLITICS AS A CRIMINAL CONSPIRACY.

By Archibald R. Watson.

THE candidate and the political boss, now, as well as at all times of activity, excitement and manipulation in political circles, will do well to exercise a certain amount of discretion and circumspection in their deals with each other, or what is regarded by most such as a legitimate part of the game of politics, may, before the participants are well aware of it themselves, develop into an offense of a nature no less grave than that involving the perversion and obstruction of public law and justice, — and of a name no less suggestive of death or dungeon as a punishment than that of "criminal conspiracy." A very few years ago, a candidate for the office of Commissioner of Public Works of the City of New York was, with his co-defendant, declared to be guilty of conspiracy on account of a compact between the two, by which the candidate, in order to secure the influence of the other, to the end that he might obtain the desired place, agreed, if he did obtain it, that the office should be conducted in all respects according to the wishes and secret dictates of the man of influence.[1] A letter alleged to have been written by the candidate to his "associate in crime" was introduced in evidence, and relied upon by the prosecution, the terms of which assuredly promised a very complete subservience on the part of the office-seeker to the will of the person upon whose influence he relied for success. The letter was as follows: —

"New York, December 26th, 18—.

"—— —— Esq.

"Dear Sir:

"In consideration of your securing not less than four County Democracy aldermen who shall vote for my confirmation as Commissioner of Public Works, in the event that the Mayor shall send in my name for that office, I hereby agree to place my resignation as commissioner, in case of my confirmation, in your hands whenever you may demand the same, and further to make no appointment in said office without your approval, and to make such removals therein as you may suggest and request, and to transact the business of said office as you may direct.

"Very truly yours,

"—— ——."

[1] People *v.* Squire, 20 Abb. New. Cas., 368.

In this case the combination appears more than ordinarily corrupt, by reason of the fact that the person who it was designed should secretly manage and control the office was ineligible to it himself, as being a contractor, whose business it was to procure and execute such contracts as might be awarded him by the Board of Commissioners. Under such circumstances the indictment, it seems, justly charged that the undertaking was "to the manifest perversion and obstruction of the due administration of the laws, to the pernicious example of all others in like case offending against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity." The crime of conspiracy at common law is of a peculiar nature, involving, as it does, almost metaphysical considerations, — the mere agreement between the confederates constituting the offense, without any execution of intent whatever. In New York, and other States, some "overt act" is required by statute, though it is not at all necessary that the object of the conspiracy should be accomplished, or even that the overt act should have any practical operation in the furtherance of the joint purpose. In this condition of the law, therefore, an unsuccessful candidate might have disgrace added to disappointment, in the way of a conviction for conspiracy, in which event he would doubtless consider himself a much abused person; or the elation of the successful candidate might be transformed

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into dismay by a prosecution at the instance of an envious, but less unscrupulous rival, or one perhaps who considered it unnecessary to "conspire." Therefore, we say, extreme caution should be exercised in the adjustment of the "machine." Certainly the writing of such or similar letters as the one which we have just seen, should, in prudence, be eschewed. Seriously, though, such a disclosure as this is very suggestive of speculation as to just how far, and to what extent, in the average case, the influence of the "boss" extends beyond the nominating convention and the polls, and controls the candidate after he has become the office-holder. Do the ones favored of the bosses in most instances bargain for favor by such compacts, express or implied? We ask for information, merely, and promise immunity from prosecution or blackmail, so far as we are concerned, to any one who will enlighten us.

LONDON LEGAL LETTER.

LONDON, October 3.

THE all-pervading incident in local legal circles is the interminable vacation which is dragging its slow length through the dullest days of a specially dull season. The Courts closed, nominally, on the 12th of August, but practically nearly a week before that date. The next term does not begin until the 24th of October, and, as that happens to be Saturday, which is always a half holiday, no business will be taken until the following Monday or Tuesday. Thus three months of enforced idleness will have been the experience of every barrister before the courts are open for him to resume his work. To many men, those who depend for their daily living upon their prefessional earnings, this means anxiety and misery and, in many instances, acute privation, and sometimes actual want. To nearly every member of the Bar it means ennui and unhealthy idleness. It is absurd to suppose that the average man with a busy occupation, in which he is interested, can every year contentedly spend three months at the seaside or on the Continent, or with fishing-rod or gun in hand. As a matter of fact, all but a very few have willingly finished their holidays and enjoyed all the rest they care for weeks ago. They are now back in town longing for work, but unable to engage in it. Few come down to their chambers, for they know that no work is awaiting them, and the Courts of the Temple are deserted, except for the office-boys and clerks, while the buildings are given over to painters and plasterers.

Every year there goes up a protest from the Junior Bar against the length of the vacation, and from many solicitors at the delays to litigation which it necessitates; but the old order is maintained because those who alone could establish a reform, the judges and the leaders, are those only who find pleasure in the present state of affairs. Most of these officials make extended tours on the Continent, and then return for a round of country houses and for the pheasant shooting, which begins on the first of October.

There is one official, however, who by law is forbidden to go out of the country, and that is the Lord Chancellor, who, as Lord Keeper of the Great Seal, must always guard that emblem of sovereign power in his personal custody, and to take it out of Great Britain would be an act closely bordering on high treason. When Cardinal Wolsey was Lord Chancellor to Henry VIII he carried the seal with him on a visit to France, and that act was one of the causes which ultimately led to the fall of the great Churchman.

The Great Seal is a double silver die into which, with painful care, molten wax is poured when an impression is required for a state document. It is as large as an American waffling iron, and its appearance in this respect doubtless inspired some mischief which once occasioned its custodian a good deal of anxiety. The story goes that while Lord Chancellor Brougham was staying, in 1833, at Rothiemurchus, the Scottish residence of the then Dowager Duchess of Bedford, the ladies of the party got possession of the Great Seal and hid it. After the Lord Chancellor had become thoroughly alarmed, apprehending that someone had abstracted it for purposes of evil design to the state, the ladies relieved his anxiety by promising to assist in the search for it if he would submit to be blindfolded. In this condition he was taken over the house and finally brought up opposite a tea-chest in the kitchen, where the Seal was discovered buried in the tea. In his joy in regaining possession of it he further submitted to see it used for making pancakes which, as they were turned out, bore the impress of the royal arms.

There are now, or will be before this sees the light, no less than ten judges of the High Court who are entitled to retire on pension. Two of these, the Master of the Rolls and Sir Henry Hawkins, are very old men, but the infirmity of age sits comparatively lightly upon them. They show no disposition to retire until compelled to do so, and the Master of the Rolls, judging by his appearance off the bench, will hold physical compulsion at arm's length for some time to come. He constantly suggests, as he walks through the corridors of the Court, clad in garments that would outshine the best dressed young lawyer on Piccadilly, the gay picture of *Sir Adonis Evergreen* as presented by Charles Matthews. There is, however, gossip constantly afloat as to his successor, and this may mean that the Bar and the public differ with him as to the probable date of his retirement. The Mastership of the Rolls

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is a splendid position. It carries with it a salary of $60,000 a year and the presidence of the Court of Appeals, a court whose working days are not oppressively numerous throughout the year. Should Lord Esher be induced to resign, the vacancy will, of course, be offered in the first instance to the Attorney-General, Sir Richard Webster; and if he accepts it, Sir Edward Clarke will be made Attorney-General. But Sir Richard Webster makes no secret, it is said, of his intention to wait for the reversion of the woolsack, and as the present Lord Chancellor will remain on that elevated seat as long as the present Government is in power, it will be five or six years yet, in all probability, before Sir Richard Webster can become Lord Chancellor. Then, too, it is universally recognized that, while Sir Edward Clarke is not altogether fitted for the Mastership of the Rolls, he would make a model Lord Chief Justice. You who have seen the present "Chief" in America, will know that he has rugged health, and you will have discovered that he has such attainments and qualities as make us all frequently wish that he may be long spared to rule over us on the Queen's Bench. Sir Edward Clarke must, therefore, also wait, we hope, a long time before his ambition can be realized. But he is young and vigorous, and can afford to wait. The solution of the matter will doubtless be found in the appointment of Sir Robert Finlay, the present Solicitor-General, to be Master of the Rolls, should a vacancy occur, while both Sir Richard Webster and Sir Edward Clarke wait with good-natured submission until their aspirations can be realized.

The first fruits of the Society of Comparative Legislation have appeared in a most entertaining initial number of its "Journal." It is highly interesting, not only as showing the practical results of the Society's work, but on account of its inherent merit. Nearly one-half of the volume of 133 pages is taken up with a review of the legislation in 1895 of the sixty Legislatures of the British Empire. It will, therefore, be of great value as an historical record to all who are concerned in technical matters connected with legislation and law-making, and to all students of sociology. It contains also an analysis, by Mr. Schuster, of the German Civil Code, one of the most important creations of modern legal science. Sir Courteney Ilbert, to whose ability and energy the Society owes its origin, contributes an essay on the application of English law to the natives of India, and although this subject may not be of practical value to American readers, it will be of philosophical interest. The work of new legislation in the United States is reviewed by the Honorary Secretary of the Society, Mr. Albert Gray, who has acquired his information from the "State Library Bulletins" of New York. These Bulletins, I am glad to say, are highly appreciated in this country by the few into whose hands they have fallen. The second number of the Society's "Journal" will probably appear during the winter, and it will contain matter that will be of especial value and interest to all American lawyers, as its principal feature will be Master Macdonel's paper on the "Comparative Costs of Legislation." The information for this paper has been obtained with great care and great personal trouble from correspondents throughout the United States, Canada, and all European countries and the English colonies. In New York, for example, reports have been received from leading lawyers in Boston, New York, Chicago, St. Louis, New Orleans, Denver and San Francisco, to whom the same set of inquiries were addressed. How their replies agree and what tariff of fees and costs can be gathered from them the report will reveal.

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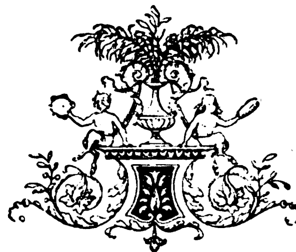

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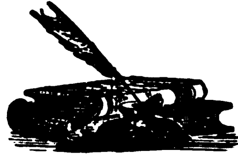
The Lawyer's Easy Chair.



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

∴ ∴ ∴ ∴ ∴ BY IRVING BROWNE. ∴ ∴ ∴ ∴ ∴

CURRENT TOPICS.

A Critic Who is Just Right!—"Modesty is what ails me," said Artemus Ward, and the Chairman is generally too modest to reproduce the kind things said to him by his editorial and professional brethren, but really, the March wind from Canada never has blown to him anything else so grateful as the following from Mr. Charles Morse's "Causerie," in the March number of the "Canada Law Journal," which has just come to his notice. He accepts it, Horace and all, very gratefully:—

"The Boston University Law School is to be congratulated upon having secured the services of Mr. Irving Browne as one of its lecturers. Mr. Browne's scholarly ability as an editor and treatise-writer have won for him a distinguished reputation both at home and abroad; while his witty productions in legal verse have a rare charm for those who delight to blend the strong waters of case-law with the nectar of Helicon. The latest honor conferred upon him prompts us to hurl a bit of Horatian philosophy at him and say,—

'Mediocribus esse poetis
Non homines, non di, non concessere columnæ!'"

A Smudge on the Mirror. — The following deserves reproduction in full: —

"Mr. Frederic William Maitland is no respecter of legal traditions and myths. On the contrary he is an iconoclast of the most ruthless kind, and whenever he penetrates into the temples where our professional forbears were wont to worship, the idols and oracles there statant and couchant have a very bad quarter of an hour. In his 'Introduction to the Parliament Rolls of 33 Edward I,' he very effectually dispelled some clouds of error that had long enveloped the origin of the remedy by petition of right. In the 'History of English Law before the time of Edward I,' written by him conjointly with Sir Frederick Pollock, he reforms some false and deep-rooted notions as to the authorship and authenticity of certain archaic repositories of the common law, such as the works known as 'Leges Henrici,' 'Leges Edwardi Confessoris,' the 'Tractatus de Legibus et Consuetudinibus Angliæ,' and the 'Dialogus de Scaccario.' But all his previous assaults upon the citadel of legal fiction are put into the shade by his recent fatal cudgelling of the 'Mirror of Justices.' Now to such of us as were launched upon the deeps of the common law in the old days when Coke upon Littleton and Blackstone's Commentaries were still the chief beacons that illuminated that 'weltering waste,' the 'Mirror' was a work not to be approached lightly or to be spoken of with irreverence. We bore in mind that my lord Coke lauded it as 'a very antient and learned treatise of the laws and usuages of this kingdom of England,' and that Lord Somers regarded it as of equal authority with Bracton and Fleta. Nor indeed did we find the work lacking esteem even in our own times and in American courts. In the well-known case of Briggs *v.* Light Boats, etc. (11 Allen, p. 166), Mr. Justice Gray refers to the 'Mirror' as an authority to show that in the early days of English law the sovereign was amenable to an ordinary action at the suit of a subject. This then being premised, it will not be wondered at that we old-fashioned people sustain a very pronounced shock when we peruse Mr. Maitland's Introduction to the edition of the work in question recently published by the Selden Society. We are not fond of neologisms as a rule, but we must say that the adjective 'baresark,' as coined at Mr. Ryder Haggard's mint, seems to most aptly express the state of mind produced in Mr. Maitland by the many proofs he finds of the author of the 'Mirror's' persistent trifling with historical facts. Indeed, to judge from the strenuousness of Mr. Maitland's language, neither Baron Munchausen nor Count Cagliostro could hold the palm of mendacity against this ancient commentator upon the common law. Let us quote from his screed: 'Our author's hand is free, and he is quite able to do his lying for himself, without any lying from Geoffrey of Monmouth or any other liar. He will not merely invent laws, but he will invent legislators also; for who else has told us of the statutes of Thurmod and Leuthfred? The right to lie he exercises unblushingly. . . . Religion, morality, law, these are for him all one; they are for him law. . . . That he deliberately stated as law what he knew was not law, if by law we mean the settled doctrines of the king's court, will be sufficiently obvious to anyone who knows anything of the plea rolls of the thirteenth century.' It is quite obvious that Mr. Maitland's manner here has not that repose which stamps the caste of the dispassionate critic; but nevertheless he quite effectually disposes of the 'Mirror's' claims to authority, and consigns it forever to the charnel house of defunct impostures."

Mr. Morse will pardon us, we are sure, if we point out exactly what Mr. Justice Gray did say on the subject. It is as follows: —

"The petitioners contend that at common law the sovereign could be sued without his consent. But it is, to say the least, very doubtful whether this position can be maintained. The earliest assertion, in an English law book, of the king's liability to an action, is probably the statement in the Mirror of Justices," etc. "But the Mirror is of no

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great authority in matters of earlier history." (Citing Palgrave and Reeve.)

We really don't know what might not happen to Mr. Morse, if he should drop in at the Supreme Court at Washington, and Mr. Justice Gray should recognize him as the person who attributed to him such faith in the Mirror. His conclusion in the case cited was quite to the contrary.

The question whether the king was subject to suit was very learnedly examined by Iredell, J., in the celebrated cause of Chisholm & Georgia, 2 Dall. 419. He cites Comyn's Digest to the statement that "until the time of Edward I, the King might have been sued in all actions as a common person." This appears to be derived from Thelwall's Digest, printed in 1579. We have not access to that ancient authority, but neither Comyn nor Iredell, J., says anything about the Mirror. Mr. Justice Gray quotes Bacon to the statement that the king could be sued was "an old fable," and referring to the fines paid to the king, before *Magna Charta*, to obtain justice, he says: "It can hardly be believed that the subject could have a writ, as of course against the king, when he was dependent on the king's favor for the right to sue a fellow-subject."

THE SAGE CASE.—Mr. Russell Sage does not deserve his name. He is a very foolish man, for instead of buying off that person whom he hysterically pulled between his body and the threatening dynamiter, to the grievous corporeal injury of the unwilling intervener, for a few thousand dollars, or paying off the first verdict, $25,000, he has persisted and gone through the courts three times, until a verdict of $40,000 has just been affirmed by the Supreme Court, and now he asks the Court of Appeals to give him a new trial so that another jury may increase the award! A hundred thousand dollars will not cover his outlay. On the other hand, it might be a curious speculation to imagine how much will be left to the victorious party. "But 'twas a famous victory," and like many another such, it will leave the victor but little, if any, better off than the vanquished.

UNEXPECTED FIRE. — Another case in which the plaintiff contended for too much foresight on the part of the carrier is one in Missouri, Sullivan *v.* Jefferson Ave. Ry. Co., 32 L. R. A. 167, where it was held that a lady passenger whose light, gauzy summer dress is ignited on an open street car in the summer by a match carelessly thrown by another passenger after lighting a cigarette cannot hold the street railway company liable for her injuries, where the servant in charge of the car was not chargeable with any negligence. It was quite enough that the car was promptly stopped and that the driver burned his hands in his efforts to pull the dress off. The Court thought that "the most prudent man would never have thought of such an accident, nor have furnished such a car in such weather with fire-extinguishers." Certainly not — not half so much as of having on board a chest of ice for possible cases of sunstroke.

NOTES OF CASES.

PERFERVID COUNSEL. — In State *v.* Shawn, 40 W. Va. 1, the defendant, convicted of murder, and condemned by the jury to death, demanded a new trial on account of the following language of the prosecuting officer to the jury: "If you sentence the prisoner to the penitentiary for life, it won't be five years till he will be let out on some excuse or pretext, and return home to enter on a new course of crime." "This is the grand culmination of an epidemic of crimes that have been committed in this county." "He is so steeped in crime that he has no friend to sit beside him during his trial." The first sentence quoted was uttered in connection with a reference to the pardon of the Chicago anarchists by Gov. Altgeld. There seems to have been no exception by the prisoner's counsel except to that sentence, and the Court remarked that "the attorney was perhaps going too far away on examples," but gave no instruction to disregard it. The Court denied a new trial, on the ground that the language did not appear to have prejudiced the prisoner. There was no doubt of the murder; the Court said it was "a sedate and atrocious murder," and that "the evidence showed him wicked, and desperately bent on great crime." One judge, concurring in the result, dissented from the argument of the main opinion, apparently because of his opposition to capital punishment. He thinks that "no man who is not totally depraved" should be denied the opportunity for repentance afforded by life-imprisonment, and winds up with an aspiration to God for mercy on the soul of the prisoner. In strong contrast with this decision is that in Kansas City etc. R. Co. *v.* Sokal, 61 Ark. 130, counsel for plaintiff proposed to read the papers on which a change of venue had been granted to defendant on account of local prejudice. Defendant's counsel objected, and plaintiff's counsel said: "It is the hit dog that always howls." The court said, "I expect that is an improper argument." Plaintiff's counsel insisted that he had a right to read the record to show that the feeling in the original county was deemed by defendant so strongly against them that they could not have a fair trial there. This was held to be prejudicial error, and a new trial was awarded.

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MILEAGE BOOKS. — In Eaton *v.* McIntire, 88 Me. 578, it is decided that a railway conductor may detach coupons from any part of a mileage book that he chooses, and is not bound to heed the request of the passenger to take them from the back. The Court regards the evidence of the custom to detach them from the front as conclusive. "What is customary is generally lawful. Custom makes law," say the Court. It is difficult to conceive of a man so fond of law that he would sue a railroad company for conversion of his mileage book in such circumstances. His love of mathematical order must have cost him a snug sum of money.

CHRISTIANITY IN THE LAW. — In Mayer *v.* Frobe, 40 W. Va. 246, the Court overrule their former decisions in 31 W. Va., and restore their precedent holding that exemplary damages are recoverable in certain cases. The judge who writes the chief opinion puts this on the somewhat fantastic ground that such damages are recognized by the Mosaic law, "in proportion to the evil intent of the wrongdoer." The judge regards this as "a more valid, ancient and sacred reason," and adds that "the common law is not agnostical, atheistical, or even deistical, but is unswervingly theistical. As its crowning glory and chief excellence, it believes in the God of Moses." In answer to this, four of the judges file a memorandum disclaiming their intention to assert for the law "any particular, distinctive, Christian creed or dogma"; denying that it is the duty of the Court "to expound religious principles, or expressly or impliedly disparage any man's belief"; professing "the highest respect and regard for Christianity," but deeming it improper, in a judicial opinion, "to appear to espouse or enforce any particular or distinctive Christian creed." So the red-hot topic of exemplary damages has even burned its way into theology! Judge Dent pronounces a very pious and edifying opinion, but if his reasoning were followed into other channels, an imitation of the Mosaic code would result in some queer consequences. This action was by a wife, under the civil damage act, and she had a verdict of $750. We have no disposition to quarrel with any law or decision that renders a drunken husband worth $750 to his wife.

"GUEST." — It is said that a justice of the New York Supreme Court recently charged the grand jury that a person, living in the place where the hotel is conducted, who boards during the week at some other premises and only takes a meal or a lunch at the hotel on Sunday, is not a "guest" within the meaning of the Raines law. He declared that this practice was clearly an evasion of the law. As upon this ruling an indictment was found against a hotel proprietor, the question may be taken before a higher court. It is not altogether clear that the judge is right. It has been held that purchasing liquor at an inn constitutes one a guest. McDonald *v.* Edgerton, 5 Barb. 560. The contrary was held in Queen *v.* Rymer, 2 Q. B. Div. 136, the bar being part of the hotel, but having a separate street entrance, and the drinker living within twelve hundred yards.

RUNNING AT LARGE. — In Briscoe *v.* Alfrey, Arkansas Supreme Court, 30 L. R. A. 607, it was held that a jackass, which escaped from its enclosure, without the negligence of its owner, was "not running at large," within the meaning of a statute charging the owners of animals running at large with all injuries inflicted by them. The Court said: "It is the intentional or negligent permission of the owner for his animal to run at large which subjects him to the civil and penal consequences prescribed by the statute. Whether the owner has exercised such care as the law requires if the facts are disputed is a question for the jury. The following authorities are cited to support the views we have expressed. Bishop, Non-Cont. L. §§ 1220 *et seq.*; Wolf *v.* Nicholson, 1 Ind. App. 222; McBride *v.* Hicklin, 124 Ind, 499; Rutter *v.* Henry, 46 Ohio St. 272; Leavenworth T. & S. F. R. Co. *v.* Forbes, 37 Kan. 448; Fallon *v.* O'Brien, 12 R. I. 518, 34 Am. Rep. 713; Presnall *v.* Raley (Tex.) 27 S. W. Rep. 200; Klenberg *v.* Russell, 125 Ind. 531; McIlvaine *v.* Lantz, 100 Pa. 586, 45 Am. Rep. 400, — all cited by appellee's counsel."

Add Wright *v.* Clark, 50 Vermont, 130; 28 Am. Rep. 496. There a hound kept for the chase, and chained when not hunting, was pursuing a fox, followed by his master and S., a fellow huntsman. While out of sight of his master, but near to S., the defendant accidentally shot him in firing at the fox. Held, that the dog was not "running at large" within the meaning of a statute authorizing the killing of animals. The Court dwell on the tractability of the dog, and avow that this dog was no more running at large "than a boy while going on an errand at his master's command." In Jennings *v.* Wayne, 63 Maine, 468, the owner of a mare and colt turned them out to water Sunday afternoon, on the highway of the defendant town. The colt ran away, and the plaintiff mounted the mare, took a turn in the halter around her nose, and pursued. While so doing, the mare broke through a culvert and was injured. It was held that the animals were not "at large without a keeper."

In Amstein *v.* Gardner, 132 Mass. 28; 42 Am. Rep. 421, a horse led on the highway escaped without his keeper's fault, and was injured by a train on

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an unfenced railway. Held that defendant was liable. In Russell *v.* Cone, 46 Vermont, 600, the owner of a horse was accustomed to ride it a distance of a mile and a half from home, and then turn it loose to return home, which it was trained and accustomed to do without loitering, being so checked that it could not feed upon the way, and persons being in waiting to receive it upon its arrival. Held, not "running at large." Animals escaping from the owner's enclosure without his fault, are not "running at large": Coles *v.* Burns, 21 Hun. 249. In Thompson *v.* Corpstein, 52 Cal. 653, it was held that cattle driven along a road, in charge of a herder, and casually eating the grass on the roadside, are not "estrays" nor "running at large."

The Iowa cases hold differently. In Welsh *v.* C. B. & Q. R. Co., 53 Iowa, 632, a horse escaping from his owner's control is "running at large," although he wears a bridle and halter. A team of horses running away are "running at large." Inman *v.* Chicago etc. R. Co., 60 Iowa, 459. Where the owner of a mare and sucking colt was leading the mare, and the colt following strayed away, it was "running at large." Smith *v.* Kansas City, etc., R. Co., 58 Iowa, 622.

So, in O'Malley *v.* McGuin, 53 Wis. 353, cattle escaping into city streets were deemed liable to be impounded as "running at large in a public place," although they sought sanctuary in a Methodist camp-meeting ground, which was private property.

A very extreme case is Goener *v.* Woll, 26 Minn. 154, where a ram was held to be "running at large" although he was running only on his owner's land, and with other sheep belonging to him. It was deemed that the ram's propensity to ramble imposed on its owner the duty of tying him up or strictly fencing him in.

SALE OF TREES. — It is a rather nice metaphysical question whether a sale of growing trees is a sale of an interest in lands or a mere sale of a chattel. There is a decided conflict on the subject. The cases are collected in Hirth *v.* Graham, 60 Ohio St. 57; 40 Am. St. Rep. 641, and as Mr. Freeman says, "slightly preponderate in favor of the rule that such a contract is one concerning an interest in lands, and within the fourth section of the statute of frauds." The subject is elaborately discussed in a note to Kingsley *v.* Holbrook, 45 N. H. 313; 96 Am. Dec. 182, and reference may usefully be had to Byasse *v.* Reese, 4 Met. 372; 83 Am. Dec. 481. Very recently the Rhode Island Court have held such a contract to be a mere *license*, conveying no interest in the land. Fish *v.* Capwell, 18 R. I. 667; 49 Am. St. Rep. 807. The Court very forcibly observe: "What the buyer pays for and expects to get is not an interest in land, but trees severed from land." In agreement with this view are the courts of Massachusetts, Maine, Maryland, Kentucky, Connecticut. On the other side are New York, New Jersey, Vermont, Alabama, Georgia, Indiana, Michigan, New Hampshire, Pennsylvania, Wisconsin, Tennessee, Ohio, Mississippi, South Carolina, and the weight of authority in England. See notes, 19 L. R. A. 721. Some of the cases, however, effectuate the agreement as a license after execution and before revocation; so in Florida and Indiana. The preponderance in favor of the application of the statute seems quite decided, rather than "slight." The question was very exhaustively examined in an opinion of 27 pages, in Owens *v.* Lewis, 46. Ind. 488; 15 Am. Rep. 295, upon authority, but there was very little discussion of the matter upon principle — as is generally the result when a judge enslaves himself to a review of "all the cases." There is a good deal of plausibility in the Rhode Island argument based on the intention of the parties, but after all it seems not quite conclusive. A man might buy a house intending to move it off and cut it into firewood, and the seller might not intend to part with the ownership of the land beneath it, and yet while the house is standing on the land it is part of it, and the sale of it would seem to be a contract concerning an interest in land.

DIGNIOR PERSONA. — We find ourselves more in sympathy with Judge Dent in his utterances in Board of Education *v.* Mitchell, 40 W. Va. 431, a case where a "school-marm," who had earned a little money in her vocation, married a notoriously insolvent man, and put those earnings, and some subsequent earnings into land, successfully resisted the attempt of the husband's creditors to gobble up her property. The Judge said: —

> "Husbands are so accustomed to their old and senile common-law prerogatives, which are slowly yielding to the nobler and more righteous enactments, that as barons not quite shorn of their strength, they still talk egotistically of their *femes'* separate estates. They, in ordinary conversation, with a selfishness born of pride, cling to the exploded theory that whatever is my wife's is mine alone, for she is, and yet is not, for I am. We are two in one, and I am the one, even though she supports me.
>
> "'Man, poor man,' said the pitying spirit,
> 'Dearly you pay for your primal fall,
> Some flowers of Eden you still inherit,
> But the trail of the serpent is over them all.'"

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The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

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

THE GREEN BAG.

Editor the Green Bag.

Mr. George H. Westley, in your June number, mentions "the very clever manner in which Portia saved Antonio his pound of flesh." Shakespeare was a great man, but if he was the little end of nothing of a lawyer, then "Your Disgusted Layman" is a Mansfield. Just think of a lawyer coming any such shallow wriggle as Portia's, to get a man off! If that dodge was tried before Judge ——, he would say "Oh Rats!" Send "a member of the Bar here" to try this case, and would hunt out "Public Policy" or some such club to knock Shylock out with. Perhaps he would give Judge ——'s "evasive answer": "Well, Mr. ——, that stuff is bald rot, and my opinion is that you know it." Then in your "Notes" on page 268, you say that Greenleaf wasn't apt on a joke. Well, if that was Mr. Greenleaf on Evidence, he could joke with a vengeance. Didn't the GREEN BAG itself tell the story of Mr. Greenleaf and the country justice? Those days lawyers used each to have his own pet squire, which squire always gave judgment for him (squires in our town do the same thing now). It happened once that Greenleaf and — somebody, perhaps Parsons — went out in the country, in a buggy to try a case before Parsons' squire. They had to adjourn over dinner time, and when the two got through with the squire, to Parsons' astonishment, the squire went against him. Coming home, Parsons said, "Greenleaf, how did that squire come to give that case against me? He never gave one against me before and this one was very plain for me." "Well, Parsons," replied Mr. Greenleaf, "while we were out for dinner, I told the squire that I was very much struck with his way of trying a case, and as I had considerable business to try soon, I would like to have some of his blanks, and (raising up the cushion of the buggy) here they are at your service." Thunder! Not capable of a joke? What was Parsons' view on that point?

YOUR DISGUSTED LAYMAN.

LEGAL ANTIQUITIES.

LORD COKE says that the official reporters ceased about the end of the reign of Henry VII, and the reason he gives for it is sufficiently quaint: "So as about the end of the reign of Henry VII it was thought by the sages of the law, that at that time the reports of the law were sufficient, wherefore it may seem unnecessary and unprofitable to have any more reports of the law."

FACETIAE.

"HAVE you fixed up my will?" said the sick man to Lawyer Quillins.

"Yes."

"Everything as tight as you can make it?"

"Entirely so."

"Well, now, I want to ask you something — not professionally, but as a plain, every-day man. Who do you honestly think stands the best show for getting the property?"

JUDGE X——, in a western city, often shows impatience at the ancient wit of prosy attorneys, and sternly represses any attempt to break the quiet of the court-room by exciting the laughter of the spectators. On one occasion after the perpetration of a particularly mouldy joke, which caused a general groan, his honor said: —

"Mr. Smith, please remember you are addressing the court, and not the audience."

"He probably thought your joke was old enough for the court to take judicial notice of," suggested the opposing lawyer.

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Mrs. Over: "They say your husband is a splendid cross-examiner in a law suit."

Mrs. Terminer: "Well, he ought to be — he's cross as can be at home."

In a breach of promise case. The Court: "What is your age, madam?" The Plaintiff: "Must I answer?" The Court: "You must." The Plaintiff: "Why, Judge, I thought people didn't have to testify against themselves."

"I hardly think," said the lawyer, "that you can get a separation from your wife on account of her making a practice of throwing things at the dog."

"But, Great Cæsar, mister!" said the man with the haggard look and the black eye, "nigh every time she throws at the dog she hits me."

Great Lawyer (in cross-examination): "So you consider the prisoner an honest man, do you?"

Witness: "An honester man never lived."

Great Lawyer (superciliously): "Will you kindly state on what you base that remarkable opinion?"

Witness (hotly): "On the fact that he once tried to be a lawyer, and failed."

An attorney in one of the Southern Counties of Pennsylvania was addressing a jury in a criminal case, in which he desired to impress them with the correctness of the evidence of an old lady, who had testified in behalf of his client. Striking an attitude, he said: "Gentlemen of the jury, you certainly will believe the testimony of this old lady. Her sun is set, her light has gone out, night is upon her. She stands with one foot in the grave, and the other on — on *terra firma*."

NOTES.

The American Bar Association held its nineteenth annual meeting at Saratoga Springs on Wednesday, Thursday and Friday, Aug. 19, 20 and 21. This meeting was one of great and unusual interest by reason of the presence of the Lord Chief Justice of England, and his delivering of the annual address. An audience of two thousand persons was present at the opening session, in the Convention Hall, on Wednesday morning, when the President of the Association, Hon. Moorfield Storey of Boston, delivered his address upon the prescribed topic, the "Noteworthy Changes in Statute Law" made during the preceding year. This address was thoughtful and scholarly throughout, and was listened to with close attention, especially by the English guests of the Association.

The afternoon sessions of the Association were devoted to the work of the Section on Legal Education. On Wednesday afternoon the Chairman of the Section, Prof. Emlin McClain, delivered an address on "The Law's Curriculum: Subjects to be Included, and Order of Presentation." The paper by Prof. C. M. Campbell of Denver, Col., on "The Necessity and Importance of the Study of Common Law Procedure in Legal Education," was, in his absence, read by Prof. Russell of the University of the City of New York. Prof. Blewett Lee of the Northwestern University read a paper on "Teaching Practice in Law Schools."

At the evening session of the Association papers were read by Hon. James M. Woolworth of Nebraska, and by Joseph B. Warner, Esq., of Massachusetts. The members of the Association also attended a reception by Hon. George S. Batcheller, at his residence, and were presented to Lord Russell. The occasion was greatly enjoyed by the guests.

On Thursday morning Lord Russell delivered his great address on "International Arbitrations." The public interest in this most notable occasion was shown by the presence of a great audience of some five thousand persons, who greeted Lord Russell with hearty and prolonged applause.

The fame and exalted position of the speaker, the importance of the subject, its application to pending affairs between England and America, and the occasion, made the address a matter of international interest. This address has been widely published and read. It is a notable one, by reason of its broadness of view, its force and its clearness of diction. The speaker stood behind a high reading desk, and read his address

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in an easy but impressive manner, with very little gesture.

At the session of the Legal Education Lecture in the afternoon, papers were read by Hon. J. Randolph Tucker of Virginia, on "The Best Training for the American Bar of the Future"; by Prof. James Colby of Dartmouth College, on "The Collegiate Study of the Law"; and a paper by Prof. Emmett of Johns Hopkins University, on "Legal Education in England," was, in his absence, read for him. These papers were discussed in a most interesting manner by Mr. Crackanthorpe of England, a member of the English Council of Legal Education, by Sir Frank Lockwood, Attorney-General Harmon, Hon. Henry Hitchcock of St. Louis, A. G. Fox, Esq., of New York, H. G. Ingersoll, Esq., of Tennessee, George Warvelle of Chicago and Prof. Sharp of Baltimore.

Hon. Edward J. Phelps of Vermont was elected Chairman of this Section, and Prof. Sharp Secretary, for the ensuing year.

At the evening session of the Association Montague Crackanthorpe, Q. C., read an interesting paper on "The Uses of Legal History."

The last afternoon session of the Legal Education Section was one of special interest. Austin G. Fox, Esq., of New York, read a paper on "Two Years' Experience of Law Examiners," and Major J. W. Powell, of Washington, on the "Study of Primitive Institutions." Lord Russell took part in the discussions of these papers, and spoke in a most interesting way, concluding as follows: "I would like, before I sit down, to be allowed to express the admiration I feel, not only for the constitution of the Congress of the United States lawyers, but for the scheme of its operations and the wise purposes to which it devotes its efforts. Its work is not new to me. I have had the pleasure of seeing now for some years the record of its proceedings; and it is to me, as it was on hearing the admirable presidential address which was delivered on Wednesday, in the highest degree refreshing to find that the profession of the law in this country is so earnestly alive to the responsibilities of its position, is so keen to observe, to weigh, to judge, to discriminate, to test the current of judgment and of legislation; and that above all it keeps before itself steadfastly and unceasingly a high ideal, not merely of what ought to be the mental equipments and the acquirements in learning, but the high moral character of the profession to which they belong."

The banquet Friday evening was an occasion not to be forgotten by any one present. After the feast of things to eat and drink, followed a remarkable feast of reason and flow of wit. How could it be otherwise with Mr. Chauncey Depew as toastmaster, and with speeches by Lord Russell, Sir Frank Lockwood, Hon. Bourke Cochran and Mr. Woolworth, the newly elected president?

A Persian philosopher, being asked by what method he had acquired so much knowledge, answered: "By not being prevented by shame from asking questions when I am ignorant."

The abolition of the old technical system of pleading and the substitution of the Reformed Procedure was, as a rule, very obnoxious to older practitioners who were accustomed to the old procedure and profited by their knowledge of its intricacies which they had bought by years of study and experience, while the new system was welcomed by the younger members of the profession, who were thus placed on equal terms with the older lawyers, or superior, as the latter were loth to take up anew the study of a new system of procedure. In North Carolina this was often exemplified by amusing occurrences. At Martin Superior Court in the spring of 1869 the defendant was represented by Hon. P. H. Winston and Hon. Asa Biggs (ex-U. S. Dist. Judge), two of the leaders of the Bar in the State, and the plaintiff by J. E. Moore and Walter Clark, both just admitted to the Bar. Mr. Moore was demanding to know whether the paper filed by defendants' counsel was "a demurrer or an answer." Being on new ground and not knowing what awful things might happen "under the Code" if he had filed a demurrer when it ought to be an answer, or *vice versa*, Judge Biggs was endeavoring to evade the question, but Moore, with the flush of inexperience was insistent, demanding "a categorical answer." Mr. Winston leaned forward, and clutching his associate's coat-tail, said in anxious tones, but loud enough to be heard by the whole Bar, "Tell him, Biggs, it is *an answer by way of a demurrer.*"

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AN old and very eminent lawyer in Boston lay dying. His daughter spoke to the attendant nurse, who thereupon left the room.

"Mary," said the patient, "what did you say to that woman?"

"Oh! nothing, father, nothing."

"Mary," came the feeble voice, "what words did you use to say nothing?"

CURRENT EVENTS.

CONSIDERATIONS of public health have been predominant in determining the most important lines of action entered upon within the last quarter of a century by municipal Glasgow. This, of necessity, has been so on account of the density of its population. Glasgow has eighty-four persons to an acre, while London has but fifty-one to the same amount of land. They first built model lodging and tenement houses, and these proved themselves so successful that they have lately built an interesting addition in the shape of a "Family House," with accommodations for one hundred and sixty-five families. It is especially intended for widows and widowers with children; there is a large nursery with trained nurses to attend to the children while their parents are working. "Public baths and wash-houses" are located in various parts of the city; each includes under the same roof capacious swimming baths for men and women, also numerous small bathrooms with every modern convenience, furnished for a small sum. In the same building with the baths, but as a distinct feature, are extensive wash-houses for the use of poor families that lack home conveniences for laundry work. For the sum of two-pence an hour a woman may use a stall containing hot and cold water and an improved steam boiling apparatus; after the clothes are washed they are deposited for two or three minutes in one of a row of centrifugal machine driers, after which they are hung in one of a series of sliding frames which retreat into a hot-air apartment. Then if she wishes the woman may use a large roller mangle, operated, like all the rest of the machinery, by steam power, and in an hour go home with her clothes in a basket, washed, dried and ironed. In 1894 the street railways passed into the hands of the municipal government, and after a very short period people were able to ride for one penny, with hopes of a future reduction. Everything they have attempted has been well done. The buildings put up are handsome and substantial, and they have all, in a short time, not only paid for themselves but proved a good paying investment to the city. The Glasgow municipal government has set an example which other city governments could follow with profit to themselves and their citizens.

THE world has lately been electrified by the news, which the German emperor has been reported as having blurted forth, that the Dreibund of the future would be between Russia, Austria and Germany, Italy sympathizing with Russia. England would then stand alone, having the friendship of no country; but England, claiming the allegiance of one-fourth of the entire population of the globe, can afford to stand alone with no fear of losing her prestige.

FIFTY thousand children were refused admission to the public schools of New York on account of the lack of accommodation. This brings to mind the old adage of the devil finding work for idle hands to do, and unless existing conditions are changed, New York's crime-list will be greatly augmented.

THE Queen of Holland was to be confirmed on Oct. 24, at the Palace of the Hague, and shortly afterwards, it is said, her formal betrothal to Prince Bernhard of Saxe Weimar will take place. Wilhelmina was born in 1880. William III, her father, was a great roué and the supposed hero of the famous "Clemenceau Case." Her mother, Regent Queen Emma during the minority of Wilhelmina, was William III's second wife and a princess of the House of Waldeck. Queen Wilhelmina is from all accounts a remarkable child, having the interests of her people near to her heart. Her greatest delight is a miniature farm of which she has the entire management. It is run in the most economical manner, quite unlike the dairy of the unfortunate and frivolous Queen Marie Antoinette of France. The produce is given to the hospitals and the poor.

ENGLAND has at length, after seventy years of discussion, decided to adopt the metric system of weights and measures, and the government, in the person of its President of the Board of Trade, has drafted a bill to be submitted to Parliament at the opening of the next session.

THERE is much grumbling in New York over the high tax-rate of $2.14 on every hundred dollars, and loud are the demands for lower assessments. Among the checks received either by mail or personal tender were $665,000 from the Vanderbilt family, $480,000 from the Astors, $85,000 from the Lorillard estate, $100,000 from R. A. Cruikshank, and $75,419 from Amos R. Eno.

THE women of Iceland have full municipal suffrage and vote in all church and parish matters. There is also a woman's political club, and public meetings are called when questions affecting the interest of the sex are before the Legislative Assembly.

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BOOK NOTICES.

LAW.

STUDIES IN THE CIVIL LAW. By WILLIAM WIRT HOWE of the New Orleans Bar. Little, Brown & Co., Boston, 1896. Cloth, $2.50; Law sheep, $3.00 *net.*

This volume is made up of a series of lectures delivered by Mr. Howe before the law school of Yale University. They are written in an interesting manner, and give the student an excellent insight into the history of the civil law and its relations to the law of England and America.

THE LAW OF PASSENGER AND FREIGHT ELEVATORS. By JAMES AVERY WEBB. The F. H. Thomas Law Book Co., St. Louis, 1896. Law sheep.

Mr. Webb has collected and classified all the cases to date bearing upon questions relating to passenger and freight elevators. The subject is one which is growing in importance, and this little book will be found valuable as containing all the law thus far laid down by the courts.

THE JEWISH LAW OF DIVORCE. According to the Bible and the Talmud, with some reference to its development in post-Talmudic times. By DAVID WERNER AMRAM, M.A., LL.B., of the Philadelphia Bar. Edward Stern & Co., Philadelphia, 1896.

Mr. Amram is well known to our readers through a series of valuable papers upon the Jewish Law which he has contributed to THE GREEN BAG. This work on the Jewish Law of Divorce was suggested to the author by the trial of a minister of the Protestant Episcopal Church for marrying again after a divorce from his first wife, because of her desertion. The views taken by the Church on the subject of marriage and divorce led Mr. Amram to inquire into the Jewish Law as found in the Bible and Talmud, and this volume is the result of his investigation. The work is interestingly written, and contains a fund of valuable information.

THE JUDICIAL MURDER OF MARY E. SURRATT. By DAVID MILLER DE WITT. John Murphy & Co., Baltimore. Cloth.

Whether or not the reader views the trial and execution of Mrs. Surratt in the same light as Mr. De Witt, he cannot but admit that the author makes out a strong case. For our part we have always considered the execution as utterly uncalled for and by no means necessary to satisfy the demands of justice. The book is very interesting and well worth reading.

JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES. By BENJAMIN ROBBINS CURTIS, LL.D. *Second Edition,* revised and enlarged by HENRY CHILDS MERWIN. Little, Brown & Co., Boston, 1896. Cloth, $2.50; Law sheep, $3.00 *net.*

Mr. Merwin has added several new chapters and many new paragraphs to Judge Curtis's admirable work, and students and practitioners will find this new edition fully up to date and in every respect a most valuable text-book upon the subject of which it treats.

THE ELEMENTS OF THE LAW OF TORTS, for the use of students. By MELVILLE M. BIGELOW, Ph. D., LL.D. *Sixth Edition.* Little, Brown & Co., Boston, 1896. Cloth, $2.50; Law sheep, $3.00 *net.*

There are few law students who are not familiar with "Bigelow on Torts." The work is in every way excellently adapted to the student's needs. This edition has been carefully revised, many passages rewritten, and it is in its present form of greater value than ever.

A FIRST BOOK OF JURISPRUDENCE for Students of the Common Law. By Sir FREDERICK POLLOCK, Bart. Macmillan & Co., New York, 1896. Cloth. $1.75.

Although this work is modestly addressed by the author to beginners in the study of the law, it possesses rare interest for those more advanced in the profession. It is in fact, as is to be expected from its distinguished author, the best exposition of the science of the law which we have ever seen. We advise every one of our readers to procure and read it without delay.

COMMENTARIES ON AMERICAN LAW. By James Kent. *Fourteenth Edition.* Edited by JOHN M. GOULD, Ph.D. Little, Brown & Co., Boston, 1896. Four vols. Law sheep. $14.00 *net.*

This masterpiece of Chancellor Kent has become as famous as "Blackstone's Commentaries," and will ever stand as a monument of marvelous legal achievement. It is worthy of note, says the editor, that in the preparation of this edition, notwithstanding the rapid development and extension doctrine in our growing country, the statements of this jurist, though long since made, have rarely been found criticised or curtailed in final decisions. The publishers have been fortunate in securing the services of Mr. Gould, as editor of this new edition. His work is always exhaustive and thoroughly reliable. Some idea of the ex-

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tent of his research may be had from the fact that he has added nearly nine thousand cases to the twenty-four thousand cited in the last edition, not including the frequent citation of other authorities than the reports and the not unfrequent further use made of decisions already cited in that edition. In its present form the work constitutes an almost complete law library.

A DIGEST OF THE DECISIONS OF THE COURTS OF LAST RESORT OF THE SEVERAL STATES, from the year 1892 to the year 1896, contained in The American State Reports, Vols. 25 to 48 inclusive, and of the notes therein contained. By W. S. CHURCH. Bancroft-Whitney Co., San Francisco, 1896. Law sheep. $4.00 *net.*

To subscribers to the series, and to all who have occasion to refer to the American State Reports, this digest is indispensable.

It contains a table of 3,530 cases reported in volumes 25 to 48; A detailed index to notes in volumes 25 to 48; References to monographic notes throughout the work; The syllabi of 3,530 cases, stating 12,571 points of law, the paragraphs or points being arranged under 263 titles of law. There is no duplication of these syllabi, but 7,328 cross-references are made thereto under 1,396 reference titles. This digest renders the enormous mass of material, cases and notes, in the 24 volumes of more than 1,000 pages each, readily available.

THE AMERICAN STATE REPORTS. Vol. XLIX. Containing cases of general value and authority decided in the courts of last resort of the several States. Selected, annotated, and reported by A. C. FREEMAN. Bancroft-Whitney Co., San Francisco, 1896. Law sheep. $4.00.

This series maintains its high standard of excellence, and the annotations in this volume are even more numerous and exhaustive than usual. To those of our readers who are not familiar with the work we heartily commend it.

HANDBOOK OF THE LAW OF REAL PROPERTY. By EARL P. HOPKINS, A.B., LL.M. West Publishing Co., St. Paul, 1896. Law sheep. $3.75.

Mr. Hopkins has succeeded, within the limits of a single volume, in giving a clear and at the same time comprehensive statement of the fundamental rules governing the law of real property. For both the student and the practicing lawyer the work is a valuable one. The publishers are to be praised for the excellent typographical work in the "Hornbook Series," of which this treatise is one of the latest issues.

THE LAW OF CHARITABLE USES, TRUSTS AND DONATIONS IN NEW YORK. By ROBERT LUDLOW FOWLER. Diossy Law Book Co., New York, 1896. Law sheep.

Mr Fowler has given to his brother practitioners in New York a work which they will find of great assistance. There is, we believe, no other treatise dealing with precisely the same topics. Aside from its legal value the work is an important contribution from an historical point of view.

A TREATISE ON THE RAILWAY LAW OF CANADA. By HARRY ABBOTT, Q. C. C. Theoret, Montreal, 1896. Law sheep.

Canadian lawyers will find this a useful handbook of the laws applicable to railway companies in their country. Numerous references are made to American and English Cases.

A MANUAL OF ELEMENTARY LAW. By WALTER DENTON SMITH. West Publishing Co., St. Paul, 1896. Law sheep. $3.75.

The student will get from this volume an excellent idea of the leading principles of law. The author attempts nothing more than to take the neophyte across the threshold and give him a general view of the treasures which lie beyond. For this purpose the work is well adapted.

LAW AND PRACTICE FOR JUSTICES OF THE PEACE AND POLICE JUSTICES in the State of New York. By PATRICK C. DUGAN of the Albany Bar. Matthew Bender, Albany, N. Y., 1896. 1 Vol. Law sheep.

This work is confined solely to the law and practice in the State of New York, and practitioners in Justices' Courts of that State will find it a reliable and valuable guide. The author has done his work most thoroughly, and to the text has added a complete set of forms.

THE ORIGIN AND HISTORY OF CONTRACT IN ROMAN LAW, down to the End of the Republican Period. (Being the Yorke Prize Essay for the year 1893.) By W. H. BUCKLER, B.A., LL.B., of Trinity College, Cambridge. Macmillan & Co., New York. Cloth. $1.10.

A vast amount of valuable imformation is contained in this little volume, and the lover of legal antiquities will find a rare treat in its pages. The history of the origin of contract as a feature of social life is of more than ordinary interest, and Mr. Buckler treats the subject in a masterly manner.

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The Green Bag.

Vol. VIII. No. 12. BOSTON. December, 1896.

JOHN MARSHALL,

THIRD CHIEF JUSTICE OF THE UNITED STATES, AS SON, BROTHER, HUSBAND AND FRIEND.[1]

By His Great-Granddaughter, Sallie E. Marshall Hardy.

"Humble mortals lay at the feet of their deities, the crowns they dare not place upon their heads."
— Madame de Stael.

THE life of John Marshall, the great judge and statesman, is a part of the history of the country he so faithfully served and so dearly loved. It is something of his other life that I am going to tell, as I have learned it from people who knew and loved him, from letters written to those people and by them. From the one account we see the surpassing grandeur of his mind, from the other the rare perfection and deep sweetness of his character. The one gave him the admiration and respect of the world, the other won him the love of all who knew him well.

He was a gentle, loving, studious boy. To his mother and sisters he was especially kind and tender. His father said, "John never seriously displeased me in his life."

His father, Col. Thomas Marshall, was upright, consistent, and plain spoken, and very intolerant of the lack of these qualities in others. It is said that when his son was a candidate for the legislature from Fauquier County, one vote only was cast against him. Col. Marshall was very angry ; he said, "That man could only have been prompted by malice and spite, and must be punished." He ascertained his name and the next time he met him gave him a sound thrashing.

John Marshall's mother was Mary Isham Keith, a daughter of Rev. James Keith, a Scotchman, and a clergyman of the Episcopal Church. The Keiths are descended from Robert Keith, grand marshal of the Scottish army under Bruce. Rev. James Keith was a son of Bishop Keith. The Bishop was guardian of his nephew, afterwards the renowned Field-Marshal James Keith, Frederick the Great's valued lieutenant, who was slain while rallying his troops the night the king was surprised in his camp at Hochkirchen. He had been dangerously wounded early in the fight, but refused to quit the field. His bust stood side by side with those of Voltaire and the Marquis d'Argens, sacredly kept in Frederick's private sitting-room. Mr. Keith having been raised with his cousin, was devoted to him. After the earl had taken part in the rising in favor of the Pretender and had left for the Continent, he carried on a secret correspondence with his cousin. When this was discovered the Parson also had to leave the country. He settled in Virginia and married Mary Isham Randolph. There is a ghost-story belonging to the Keith family, as is common in all great families in Scotland, Ireland and England. Mr. Keith had a classmate at college named Frazier. When they parted, the one to go to America and the other to go as a soldier to India, they pledged themselves that the one who died first should appear to the other to tell him what came after death. So one day, years after, in Virginia, Mr. Frazier came to

[1] From Family Papers and Letters.

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Mr. Keith in the garb of a soldier, and told him of the future state.

Mrs. Marshall was a woman of great force of character and strong religious faith. She was pleasing in mind, person and manners, and her son loved her with that chivalrous, tender devotion which made him gentle with all women throughout his life. The Judge told Judge Story a few weeks before his death, that he had never failed to repeat each night, through his long life, the little prayer, which begins, "Now I lay me down to sleep," that he had learned, when a baby, at his mother's knee.

The Chief Justice's mother and father are buried in the burial-ground known as "The Hill," outside of Washington, the first county seat of Mason County, Kentucky. The inscription on Col. Marshall's tomb is: "Thomas Marshall, to whom this memorial is inscribed, was born the 2d of April, 1730, intermarried with Mary Keith, in her 17th year, by whom he had fifteen children, who attained maturity, and after distinguishing himself by the performance of his duties as a husband, father, citizen and soldier, died on the 22d of June, 1802, aged 72 years, 2 months and 20 days." His will was executed June 20, 1798, in Woodford County, Kentucky, the county which he had caused to be named for his old commander in the Revolutionary War, Gen. Woodford. He left the Chief Justice an estate in Fauquier County, Virginia, called "The Oaks," and two tracts of land on the Licking River.

John Marshall "was taught nothing in the cradle he had to unlearn in riper years." Both father and mother were well fitted to train him, by precept and example, so day by day he learned that love and respect for the laws of God and man which in after years made him so faithfully obey them himself and so skillfully expound them to others.

The Chief Justice says, in his "Life of Washington": "A desire to know intimately those illustrious personages who have performed a conspicuous part in the great theater of the world, is, perhaps, implanted in every human bosom. We delight to follow them through the various critical and perilous situations in which they may have been placed, to view them in the extremes of adverse and prosperous fortune, to trace their progress through all the difficulties they have surmounted, and to contemplate their whole conduct at a time when, the power and pomp of office having disappeared, it may be presented to us in the simple garb of truth."

Like most of the young men of that day, he served a term at surveying, and Miss Martineau says she was told he discovered that exquisitely beautiful spot, "Hawk's Nest," near Kanawha Falls in West Virginia, on the line of the Chesapeake and Ohio railroad, while surveying in the mountains.

It was in 1777 he first met Alexander Hamilton; from the first moment he admired him, and that admiration soon grew into love. It was one of the strongest evidences of the extreme justice of his character that he could so fairly and honestly sit in judgment upon Aaron Burr, the murderer of this cherished friend, that his detractors said he showed every partiality to Burr.

A sister of his thus describes a visit he made to his home near the close of the Revolutionary War: "He was then an officer in the American army, and he came home for a visit, accompanied by some of his brother officers, some young French gentlemen. When supper time arrived, mother had the meal prepared for them, and had made into bread a little flour, the last she had, which had been saved for such an occasion. The little ones cried for some, and brother John inquired into matters. He would eat no more of the bread which could not be shared with us. He was greatly distressed at the straits to which 'the fortunes of war' had reduced us, and mother had not intended him to know our condition."

On the 3d of January, 1783, he married Mary Willis Ambler. She was a lovely woman, and belonged to a family so noted for

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their piety that the saying went, "as pious as an Ambler." She was a daughter of Col. Jaquelin Ambler, a descendant of the Huguenot Jaquelin who fled from France when the persecution of the Protestants began. Her mother was Rebecca Burwell, a famous beauty who discarded Thomas Jefferson to marry Col. Ambler. Miss Susan Randolph gave this account of Jefferson's courtship: "He is a boy, and is indisputably in love in this good year 1763, and he courts and sighs and tries to capture his pretty little sweetheart, but like his friend, George Washington, fails, the young lady will not be captured." It is a somewhat notable fact that Miss Cary, who refused George Washington, married Edward Ambler, brother of the man preferred to Jefferson. The story goes in the family that Washington, a very short time before his marriage to Mrs. Custis, wrote to Miss Cary, telling her it was not even then too late for her to change her mind, he would break off his engagement with the widow, but she again refused him.

JOHN MARSHALL.
(At the age of 46. From a miniature.)

Some years ago I wrote to my great-uncle, the late Hon. Edward C. Marshall, and asked him to write me some things of his father and mother. He was their youngest son. He replied as follows: —

"In the year 1783, after leaving the Revolutionary army, having served from the beginning to near the end of the war, father courted Miss Mary Ambler, a beautiful girl of Yorktown, Virginia, who was very young, being only fifteen years of age. This courtship upon the first trial, was unsuccessful, she being so young and bashful that she said 'no' when she meant to say 'yes.' The mistake however was corrected, some time after, by the kind offices of a cousin, a Mr. Ambler. Seeing how things were, he sent to the disappointed lover a lock of her hair, cut without her knowledge. My father, supposing she had sent it, renewed his suit and they were married. They were a most devoted couple, living together forty-eight years. My mother died in 1831. My father, surviving her four years, and feeling her loss severely, proposed to move from Richmond to Fauquier, where his children and brother resided; with that purpose he was building an addition to his son James' (your grandfather) house, Leeds Manor, expecting his new residence to be ready for him that summer, from which he was cut off by his death in the year 1835, July 6th. It was an interesting exhibition of father's devotion to my mother's memory, who was buried near Richmond, Virginia, that he habitually walked to her grave every Sunday afternoon, a distance of one and a half miles. Upon one Sunday afternoon, suffering with the malady which led to his death, he was taking his accustomed walk, when he fell from exhaustion on the common outside the city and was unable to proceed. He was fortunately seen by two negro men (everybody knew him) and was carried in their arms to his home, whence he went to Philadelphia and placed himself under the care of the celebrated doctors Physick and Chapman. Without avail, how-

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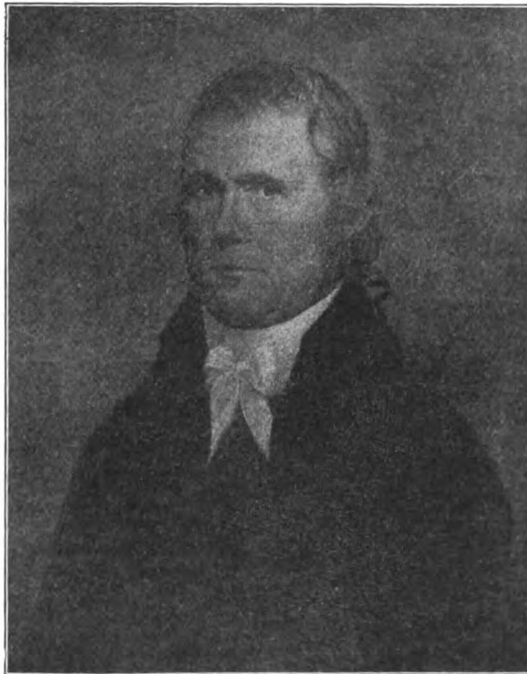
ever, as in a few weeks his body was brought to Richmond and buried by the side of his dear wife."

The marriage took place at the residence of the bride's father, who was at the time Treasurer of Virginia and the best loved man in the State. The house is a long frame building, an old-fashioned story and a half, with a Dutch roof, on the west side of Fifth, between Brook and Marshall Streets in Richmond.

The Chief Justice was for years a member of the Richmond Quoit Club. It was formed in 1788 and lasted for more than forty years. It had thirty members, and he was one of the most enthusiastic and by far the most popular. They met once in two weeks, from May until October, near Buchanan's Spring, a mile from the city. The members were of all professions, and the governor of Virginia had an invitation when he entered office. The dinner was at half past twelve. The chief dish was a barbecued pig. The following recipe for the punch used I got from an old Virginia gentleman: lemons, brandy, rum, madeira, poured into a bowl one-third filled with ice (no water), and sweetened. This same recipe was used by the Richmond Light Infantry Blues, an organization that covered itself with glory during our Civil War. The Blues served this punch for years in a handsome India china bowl which held thirty-two gallons and which they greatly mourned when it was lost when the Spotswood Hotel burned on Christmas Eve, 1870. For many years, Jasper Crouch, a noted colored man, made and served this punch; with an inimitable air he would go up to some honored guest on each occasion and say with a great flourish: "You is a judge; is de eroma of de proper flavor? Am it all smooth and savory?"



JOHN MARSHALL (from an old painting).
At about the age of 40.

Good humor always prevailed at these meetings. The Constitution of the Club forbade the discussion of politics or religion, those topics so conducive of quarrels. Such was the partiality for the Chief Justice that it is said the greatest anxiety was felt for his success in the game by bystanders, and on one occasion an old Scotchman was called on to decide between his quoit and that of another member; after seemingly careful measurements he announced, "Mister Marshall has it a leattle," when it was clear that the contrary was the case.

When he went as one of the envoys to France, with Pinckney and Gerry, President Adams wrote to Mr. Gerry: "Mr. Marshall is a plain man, very sensible, cautious, guarded, and learned in the law of nations. I think you will be pleased with him."

Upon his return from France the following note was received by him from Thomas Jefferson, who was at the time secretly trying to ruin him. In after years the Chief Justice frequently laughed over it, saying, "Mr. Jef-

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ferson came very near writing me the truth, the added *un*, to lucky, policy alone demanded." The note is now the property of one of the Chief Justice's granddaughters.

"Thos. Jefferson presents his compliments to General Marshall. He had the honor of calling at his lodgings twice this morning, but was so un‸lucky as to find that he was out on both occasions. He wished to have expressed in person his regret that a pre-engagement for to-day, which could not be dispensed with, would prevent him the satisfaction of dining in company with Genl. Marshall, and therefore begs leave to place here the expressions of that respect which in company with his fellow citizens he bears him.

"Genl. Marshall,
at Oeller's Hotel, June 23d, 1798."

The friendship between Washington and Marshall lasted until the General's death, and was deep and warm. The following is a note Mr. Marshall received from him after his election to Congress:—

"Mt. Vernon, 5th May, 1799.

Dear Sir: — With infinite pleasure I received the news of your election. I am sorry to find the publication you allude to should have given you a moment s disquietude. I can assure you it made no impression on my mind, of the tendency apprehended by you."

Mr. Marshall was "after the most straightest sect," a Federalist of the Hamilton school, and his dislike for Mr. Jefferson was intense, and lasted through life. They bitterly disagreed about a matter of vital interest to the University of Virginia, and from that time the Chief Justice never spoke to him, and he sent his five sons to northern colleges, and his grandsons were also sent north to be educated. Not until his great-grandsons were ready for college were any of his blood to be found among the students of that University.

In the year 1801, Princeton College conferred the degree of LL.D. on him. His

CHIEF-JUSTICE MARSHALL'S HOUSE AT RICHMOND.

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youngest son, the late Hon. Edward C. Marshall, wrote of his father's appointment as Chief Justice: "In the year 1825 I paid a visit to Mr. Adams, in Quincy. He gave me a most cordial welcome, and, grasping my hands, told me that his gift of John Marshall to the people of the United States was the proudest act of his life. Some years after, in conversation with my father, he told me that the appointment was a great surprise to him, but afforded him the highest gratification, as, with his tastes, he preferred to be Chief Justice to being President." My grandmother, his daughter-in-law, once said to me: "The descriptions of his dress are greatly exaggerated; he was regardless of style and fashions, but all those who knew him best and saw him daily testified to the extreme neatness of his attire."

One of my aunts, a granddaughter of his, wrote me: "You ask me to tell you something of your great-grandfather. From my father I learned veneration for him as a simple-hearted, good man; true, just and honorable. He knew, from others I would hear my grandfather was a great man. Of this my father never spoke. My mother has often told me that numerous of the anecdotes of him were without foundation, especially those indicating his slovenliness. He was extremely neat, but careless as to the style of his dress, and always looked old-fashioned, I suppose."

The gentleness of his manner, his unvarying politeness, attracted all. On one occasion he was riding down Main Street in Richmond, and, as was his custom when on horse-back, held in his hand a long, keen switch. A gentleman standing on the corner said to a friend: "What a long switch the Chief Justice carries." "Is it possible that is Judge Marshall?" replied the other. "I will ask him what he carries such a long switch for," and he actually stopped the old man to ask him the question. With the greatest politeness the Chief Justice answered: "To cut my horse with," and bowing, rode on. The gentleman was so chagrined at his own impertinent conduct and the quiet, dignified politeness of the Judge that he wrote him an humble apology. The Chief Justice kept these switches, long, keen birch, in a certain place in his hall. He cut them himself at his farm, a few miles from the city.

His wife was for many years an invalid, and therefore saw very few people except the members of her immediate family, and her sisters; but for the loss of her health she would have been an ornament to society, for she was a beautiful, cultured woman. That she had a strong character is shown by the influence she had with her husband. He deeply felt that influence, and her death was a blow from which he never recovered. Of his virtues in private life too much cannot be said. From the day of the failure of his wife's health to the moment of her death, embracing a period of twenty years, he ceased not to lavish upon her the tenderest care and devoted attention which a kind and loving heart could prompt, or willing hands bestow. His manly strength supported her in her great suffering.

A nephew, the late Hon. Martin P. Marshall of Kentucky, who made his home for some time with him, spoke in terms of the warmest admiration. Daily intercourse with him had taught him to love and revere him. He dwelt particularly upon the simplicity and beauty of his private life; he said: "He was a model of what a husband should be to the wife of his bosom, in respect to the love which he should cherish for her, the tenderness with which he should watch over her and nurse her in failing health, and the fondness with which he should think of her when death has taken her from his arms."

He would frequently rise in the night to drive animals from the vicinity of his home, that by their noise were annoying his wife, who was very nervous and required absolute quiet, and he would not stop until he had driven them some distance.

My father, the late Dr. Burwell Marshall,

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who was a favorite grandson and spent his Christmas holidays with him, told of his taking him every morning and evening to his grandmother's room to speak to her. Before they would start, each time, he would charge him to be very quiet, and then go in on tiptoe, with his finger on his lips.

In his home he was the perfect host, the most courteous and hospitable of men, and his house was always one of the most attractive in Virginia. Especially were young people to be found there. His gentleness invited confidence, and they confided to him their troubles. He was generous, kind and lenient with them. Time and again he was known to pay young men's debts and start them in life. The little hesitation in his speech is said to have lent it force and charm in private conversation.

He had six children: five sons and one daughter. He was a most devoted father, deeply interested in all that concerned his children. Nothing was left undone that could please or instruct them, and he commanded from them a feeling of loving reverence. The following is a letter to my grandfather, his son, the late Hon. James Keith Marshall of Fauquier County, Virginia: —

ROOM IN HOUSE AT RICHMOND, USED BY CHIEF-JUSTICE MARSHALL AS A LIBRARY.

RICHMOND, Dec. 14, 1828.

MY DEAR SON: Your hogs arrived on Wednesday evening. I had twelve of them killed on Friday morning. They weighed 1891. The remaining thirteen will be killed as soon as the weather will permit, perhaps to-morrow, but the weather I fear is too hot. I fear you will be disappointed in the price. It is four dollars only. An immense quantity has come in from the West. I shall give you four and a quarter, and take myself what I cannot sell at that price. As I can know nothing about the title to the land in question, I presume your object is to make some inquiries respecting the characters of Mr. M. and Mr. A. Of Mr. A., I know nothing. Mr. M. is a lawyer of eminence, who was formerly a judge. He unfortunately engaged in some purchases in the mad times that have gone by, which wasted his fortune, in consequence of which he resigned

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his seat on the bench and returned to the bar. He is a sensible man, and I should place confidence in what he says. Were it my business I should procure the information he asks and give him a moiety of the land if he will prosecute the claim at his own expense. I should have feared that the act of limitations was already a bar, but Mr. M.'s judgment may be relied on. Your mother's love to the family.

I am, my dear son,

Your affectionate father,

J. MARSHALL.

His dress was so simple and old-fashioned, and his manner so unaffected and plain, that a number of ludicrous mistakes occurred. One morning he went to call on a lady who had just married his brother, and who had never met him. She was expecting the butcher to call to look at a calf she wished to sell. When the servant told her a man wanted to see her at the door, the girl had not thought him worthy to enter the parlor, Mrs. Marshall, glancing around, also deceived by his plain clothes, concluded he was the butcher and ordered him to be taken to the stable to see the calf. He laughingly explained who he was, and the lady, very much confused and mortified, hastily invited him in.

He was devoted to farming, and understood it thoroughly. He had a farm near Richmond where he spent much time, and he could discourse as learnedly on pasture and tillage, crops and stock, as on the law. A cousin told me he met him hurrying out to his farm one morning. He had a large jug resting on the pummel of his saddle, and, having lost the cork, was holding his thumb in it for a stopper. It was whiskey for his hands. He was so energetic, that he hated to be waited upon. This same cousin, the late Dr. Fisher of Virginia, met him one morning during the term of his court in Richmond, hurrying back home. As he passed he said: "I left my spectacles, and am going back for them." The young man insisted upon going for them for him, but he emphatically declined, saying: "No, thank you, I will go myself."

A nephew of his wife told me: "He called a day or two after the arrival of myself and bride in Richmond, with his usual promptness in extending courtesies to all. He made himself so agreeable that he completely won my wife's heart. A few days after he gave an elegant dinner in our honor, and drank this toast, standing, 'To all our sweethearts.'"

In a letter to a friend John Randolph once said: "You are right to like the Chief Justice's madeira, for it is very fine." This wine was some he brought from France in 1798. It was carefully preserved in the family and used at the weddings of descendants. After the war some of it was sold to buy bread for some members of the family. Some years ago, when I was visiting in Washington, a prominent and charming society woman said to me: "Come to me, Miss Marshall, and I will give you some of your great-grandfather's famous madeira. But," she quickly added, "perhaps you do not like my having it, and I am sorry I mentioned it." "Indeed," I replied, "you are quite mistaken, I am glad you bought it, for the money was very necessary to some people very dear to me, and I will come, with pleasure, to taste it." So it came, by the fortunes of war, that I drank my great-grandfather's wine in a stranger's house.

When absent from his wife, the Chief Justice wrote to her frequently, cheering her weary hours of pain with graphic and lively descriptions of the sayings and doings in the capital city. He always called his wife Polly.

The following is part of a letter to Mrs. Mary W. Marshall, Richmond, Va.:—

WASHINGTON, Feb., 1829.

Our sick judges have at length arrived and we are as busy as men can well be.

I do not walk so far as I formerly did, but I still keep up the pastime of walking in the morn-

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ing. We dined on Friday last with the President and I sat between Mrs. Adams and the lady of a member of Congress whom I found quite agreeable as well as handsome. Mrs. Adams was as cheerful as if she was to continue in the great house for the ensuing four years. The President also is in good health and spirits. I perceive no difference in consequence of the turn the late election has taken. General Jackson is expected in the city within a fortnight and is to put up in this house. I shall, of course, wait on him. It is said he feels the loss of Mrs. Jackson very seriously. It would be strange if he did not. A man who at his age loses a good wife, loses a friend whose place cannot be supplied. I dine to-morrow with the British Minister and the next day again with the President. I have never before dined with the President twice during the same session of the Court. That on Friday was an official dinner. The invitation for Tuesday is not for all the other judges and I consider it a personal civility. Tell Mr. Call all the Secretaries are sick, and Mr. Clay among them. He took cold by attending the Colonization Society and has been indisposed ever since. The town, it is said, was never so full as at present. The expectation is that it will overflow on the 3d of March. The whole world, it is said, will be here. This however will present no temptation to you to come. I wish I could leave it all and come to you. How much more delightful would it be to sit by you than to witness all the pomp and parade of the inauguration."

MARY WILLIS MARSHALL (née Ambler).
Wife of Chief-Justice Marshall.

He was always devoted to walking, but more especially before breakfast in the early morning. A venerable professor I met in Washington told me that, when he was a boy, regularly every morning at seven o'clock, when he was on his way to school, he met the Chief Justice returning from a long walk. He walked rapidly always. Hon. Horace Binney says: "After doing my best one morning to overtake Chief-Justice Marshall, in his quick march to the Capitol, when he was nearer to eighty than seventy, I asked him to what cause in particular he attributed that strong and quick step, and he replied that he thought it was most due to his commission in the army of the Revolution, in which he had been a regular foot practitioner for six years."

In 1831 he was attacked by stone in the bladder. A surgical operation was performed, and his physicians said his recovery from the operation was due "to his extraordinary self-possession, and to the calm and philosophical views which he took of his case."

Miss Harriet Martineau gives this description of a scene in the Supreme Court room during the trial of the case between the State of Georgia and the Cherokee Indians, in 1831: "I have watched the assemblage when the Chief Justice was delivering a judgment. The three judges on either hand, gazing at him more like learners than associates; Webster standing firmly as a rock, his large, deep-set eyes wide awake, his lips compressed, and his whole countenance in that intent stillness which easily fixes the eye of the stranger. Clay

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leaning against the desk in an attitude whose grace contrasts strangely with the slovenly make of his dress, his snuff-box for the moment unopened in his hand, his small grey eye and placid half-smile conveying an expression of pleasure which redeemed his face from its usual unaccountable commonness. The Attorney-General (William Wirt), his fingers playing among his papers, his quick black eye, and the thin, tremulous lips for once fixed, his small face, pale with thought, contrasting remarkably with the other two. These men, absorbed in what they are listening to, thinking neither of themselves nor each other, while they are watched by the group of idlers and listeners, among them the newspaper corps, the dark Cherokee chiefs, the stragglers from the far West, the gay ladies in their waving plumes, and the members of either House that have stepped in to listen; all these I have seen constitute the silent assemblage, while the mild voice of the aged Chief Justice sounded through the Court."

She thus writes of the Chief Justice's opinion of slavery: "Chief-Justice Marshall, a Virginian, a slave-holder, and a member of the Colonization Society (though regarding this society as being merely a palliative, and slavery incurable but by convulsion), observed to a friend of mine, in the winter of 1834, that he was surprised at the British for supposing they could abolish slavery in their colonies by act of Parliament. He could not think that such economical institutions could be done away by legislative enactment. When it was done, the Chief Justice remarked on his having been mistaken, and that he rejoiced in it. He now saw hope for his beloved Virginia, which he had seen sinking lower and lower among the States. The cause, he said, was that work is disreputable in a country where a degraded class is held to enforced labor. He had seen all the young, the power of the State, who were not rich enough to remain at home in idleness, betaking themselves to other regions where they might work without disgrace. Now there was hope, for he considered that in this act of the British, the decree had gone forth against American slavery, and its doom was sealed."

Letter to his son, Hon. Edward C. Marshall: —

WASHINGTON, Feb. 15, 1832.

MY DEAR SON: Your letter of the 10th gave me great pleasure, because it assured me of the health of your family and the health of the other families in which I take so deep an interest. My own has improved. I strengthen considerably, and am able, without fatigue, to walk to court, a distance of two miles, and return to dinner. At first this exercise was attended with some difficulty, but I feel no inconvenience from it now. The sympathetic feeling to which you allude sustains no diminution, I fear it never will. I perceive no symptoms, and I trust I never shall, of returning disease. The question of Mr. Van Buren's nomination (minister to England) was not exempt from difficulty. Those who opposed him, I believe, thought conscientiously that his appointment ought not to be confirmed. They felt a great hostility to that gentleman from other causes than his letters to Mr. McLane. They believe him to have been at the bottom of a system which they condemn. Whether this conviction be well or ill founded, it is their conviction, at least I believe it is. In such a case it is extremely difficult, almost impossible, for any man to separate himself from his party.

This session of Congress is indeed peculiarly interesting. The discussion of the tariff and on the bank, especially, will, I believe, call forth an unusual display of talents. I have no hope that any accommodation can take place on the first question. The bitterness of party spirit on that subject threatens to continue unabated. There seems to be no prospect of allaying it. The two great objects in Virginia are internal improvements and our colored population. On the first, I despair. On the second, we might do much if our unfortunate political prejudices did not restrain us from asking the aid of the Federal government. As far as I can judge, that aid, if asked, would be freely and liberally given. The association you

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speak of, if it could be made extensive, might be of great utility, and I would suggest the addition of a resolution not to bring any slave into the country.

I am, my dear son,
You affectionate father,
J. MARSHALL.

Every year he paid a visit to his sons and his estates in Fauquier County. It was the custom during these visits, for one of his sons to give a dinner, to which all his relatives in the neighborhood, and there were a goodly number, were invited to meet him. On one of these occasions the dinner was given at Leeds Manor, the home of my grandfather, his son, James Keith Marshall. Just before the dinner hour there was a violent storm, and lightning struck the house. Several persons were injured, one, his granddaughter, Mary Harvie, the daughter of his only daughter, a girl of eighteen, so severely that she was paralyzed all her life, and a great sufferer. The old judge sat calm and cool during the terrible tumult, and was uninjured. With his usual thoughtfulness, as soon as possible he went to the room where my grandmother, his daughter-in-law, lay ill. She told him she had heard the noise, but did not know what had been the cause. In his calm and gentle way he sat down by her, and so entirely reassured her, that, not for several hours, when he came in himself to see her, completely restored, did she find out that her husband had been among the injured.

MARY ISHAM MARSHALL (from an old painting).
Mother of Chief-Justice Marshall.

He intended leaving Richmond to make his home at Leeds Manor. A little granddaughter sitting by his side one day, when he told her he was coming to live with them, said, with childish delight, for she was devoted to him: "Oh! grandpa, I am so glad you are coming to live with us, you shall have turkey and plum-cake every day for your dinner." "Ah! my dear little girl," was his amused reply, "you will soon kill your poor old grandfather, if you keep him on such a diet as that."

Leeds Manor is at the foot of little Cobbler Mountain. In all the world there is no more beautiful spot.

My little son owns the following letter which the Chief Justice wrote to my father for his eleventh birthday: —

WASHINGTON,
March 11, 1835.

MY DEAR GRANDSON: I have received your letter of the 25th of February, and am not a little gratified at the account you give of your standing in your class. It does you great honor as a student to remain so long at the head of it.

Cicero was an elegant scholar, and the greatest orator of his day. Besides his orations he has written several essays which have attracted much admiration.

I am very glad to hear of your progress in arithmetic, and to see that you improve in your handwriting. Boys are too apt to neglect their handwriting. It is a fault which, I am gald to believe, you will not commit. You have had a very severe winter, but that is not unfavorable to study.

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If you have been unable to go to school, the time, I am sure, has not been lost. Nothing is more precious than time, especially to the young, and yet nothing slips from us less regarded or less valued.

I am, my dear grandson,
Your affectionate grandfather,
J. MARSHALL.

A number of my father's schoolmates asked him for his grandfather's autograph. The Chief Justice was in Washington at the time, but there were some of his books in the library at Leeds Manor, in which he had written his name. My father tore the pages from the books which bore his grandfather's name, and taking them back to college with him, proudly distributed them among the students. His father did not find it out for a long time, and by that time, I am sure my father regretted it as much as I did when I saw the mutilated books.

At the close of the session of 1835 the Chief Justice returned to Richmond, but was soon so seriously ill that he went to Philadelphia to consult the celebrated physicians for which that city was noted. His sons James and Jaquelin went with him, and during his last hours he was lovingly attended by them and by many friends, among whom was Justice Baldwin of the Supreme Court, who, it is said, "like all his associates, entertained for the Chief Justice a respect and affection amounting almost to reverence."

The Chief Justice died, Monday, July 6, 1835. It was in the evening, and he quietly and peacefully closed his eyes in this world with the blessed certainty of opening them in heaven.

So the righteous judge gave his last opinion and went to appear at that bar, the Judge of which "reserves to Himself the right to search the hearts of men," but it is hoped "the good he did may live after him" as long as the world lasts, and that the Court over which he presided for nearly half a century may remain unchanged, the admiration of the world and the honor of the American people.

His body was taken to Richmond, accompanied by Gen. Scott, Judge Baldwin and a deputation of the Bar of Philadelphia, who on their arrival were received as guests of the city.

He is buried in Shockoe Hill Cemetery, near Richmond. The clerk of his court, when dying, requested that he might lie somewhere near him and that his tomb might be similar, only lower and shorter, not wishing it thought that even in death he would desire to place himself on a level with the man he so loved and revered.

His death produced profound grief throughout the country, but more especially in Richmond, where he was best known and loved. One of Virginia's greatest statesmen of these latter years, a man who worthily walked in the footsteps of those giants of old, the late Hon. James A. Seddon, the Confederate Secretary of War, wrote to me on this subject: "When I moved, a young aspirant in the legal profession, to Richmond, his lamented presence had departed, leaving to this city, where he was universally beloved and revered, the poignancy of a special bereavement. The memories and traditions of him, his mode of life, his manners and his traits of character, were fresh and vivid with all, and it seemed a solace and a satisfaction to nearly everyone to recall some manifestation of his virtues and amiability and to express their admiration and love. I was particularly struck with the fact that, while the highest possible deference was always manifested for his transcending abilities and elevation of character, on the part of none, not even the humblest, was displayed any trace of awe or fear, but on the contrary the feeling of love, of confidence in his goodness and due appreciation of all, seemed to have attached each one to him and given them, as it were, a common pride and satisfaction in the man and his greatness. His character must have been one of marked

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simplicity, genuine kindness and widespread sympathy, to have so impressed and won on the affection of all."

"I saw him in Washington, in the Supreme Court. My interest was mainly attracted and centered by the great Virginian, pre-eminent in his official rank and even more by acknowledged ability and influence. The impress of the whole scene and of the man are, to this distant hour, distinct and indelible on my memory. Would that I could present to you exactly the picture as it now stands visibly present to 'my mind's eye': you would have your great-grandfather's noble image in the dignity of his official robes and central position and with all the interesting surroundings of his brethren of the Bench, the illustrious Bar, and of the distinguished audience of strangers and public men. He presided in simple majesty, with perfect ease and naturalness of manner; without a trace of ostentation or self-consciousness of position. Amiability and firmness blending admirably in his expression, which alone seemed to guide and control, without need of utterance, the order and proceedings of the court. His head shapely and his brow full rather than lofty, surmounting well moulded, firm and harmonious, rather than sharp-cut or handsome features, with eyes somewhat under the brow, full and dark, clear with the light of quick apprehension, concentration of attention and deep reflection, all admirably blent yet separately discernible. Vivid throughout the whole, indicative of a lofty, trained intellect in active exercise, taking in, noting, deciding or storing away for reflection the weighty arguments being submitted by the pleading counsel, perhaps Mr. Webster, Wirt or the after Chief-Justice Taney, or some other magnate of the bar. I thought him then, and with all my later experience of courts and men, I think him now, the most perfect model and example of the upright judge, the high official, the intellectual sage and the noble gentleman."

GRAVE OF CHIEF-JUSTICE MARSHALL.

There are many portraits and statues of him throughout the United States. His figure is on the grand Washington Monument in the Capitol Square, Richmond, Va., with the allegorical figure of Justice, and the inscription, "Great Bridge and Stony Point," two of the Revolutionary battles in which he fought. In the Westmoreland Club in Richmond there is a portrait, the property of the Virginia Historical Society. There are two portraits of him in the consultation room of the Supreme Court at Washington, one a beautiful, ideal picture by Peale, with "Justice" inscribed under it. Could a man have a greater, grander tribute than that? In his own person to personify justice. The other portrait is a rough affair, a poor copy of a portrait owned by one of his descendants. It was presented to the Court by Chief-Justice Chase.

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There is a bust of him in the Supreme Court room. The State of Virginia owns a portrait, as does also Kentucky; the latter is kept at Frankfort, the capital. A good likeness belongs to the Washington and Lee University, and a very handsome one to the Bar Association of New York. It was the gift of one of New York's prominent lawyers, and hangs in their rooms. There are many others, too numerous to mention.

The fund for the beautiful monument at the entrance to the Capitol grounds at Washington City was begun by the Bar of Philadelphia soon after his death. The statue was made by William Story, so the son perpetuated in bronze the features of the man his father loved. The Bar Association of Philadephia owns a portrait painted by Inman.

He was the first President of the Washington Monument Society, and a member of the Society of the Cincinnati.

FORGIVENESS.

YOUR clemency has taught us to believe
It wise, as well as virtuous, to forgive.
And now the most offended shall proceed
In great forgiving, till no laws we need.
For law's slow progresses would quickly end,
Could we forgive as fast as men offend.
Revenge of past offenses is the cause
Why peaceful minds consented to have laws:
Yet plaintiffs and defendants much mistake
Their cure, and their diseases lasting make;
For to be reconciled, and to comply,
Would prove their cheap and shortest remedy:
The length and charge of law vex all that sue;
Laws punish many, reconcile but few.

— DAVENANT.

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THE NEW ABRIDGMENT OF THE LAWS OF ENGLAND.

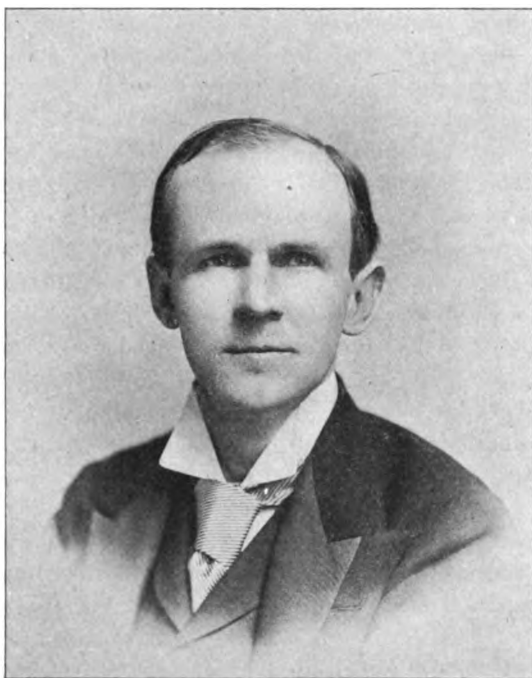
(AN INTERVIEW WITH THE EDITOR.)

AS Mr. Wood Renton's name is familiar to many of your readers, I thought I should like on their behalf to learn at first hand some particulars concerning the *magnum opus* of which he has undertaken the editorial responsibilities.

I accordingly looked in one afternoon upon Mr. Wood Renton at his pleasant chambers in Garden Court Temple. The customary preliminaries over, I invited the editor to tell me all about his enterprise.

"It is not correct to speak of the proposed work as my enterprise," he replied, "for I am purely the ministerial officer, so to speak, charged with its due execution. The credit of the idea belongs exclusively to Mr. Charles Green of Edinburgh, the head of the Scottish Law Publishing House, Messrs. Wm. Green & Son, who, encouraged by the phenomenal success of his Encyclopædia of Scots Law, bethought him to essay the infinitely greater scheme of presenting in somewhat similar form a complete statement of English Law. The conception of such a work has occurred to very many lawyers, but it has only now assumed a definite and practical shape.

"Messrs. Sweet and Maxwell of London are to collaborate in the publishing department with Messrs. Green,* so that as far as trade prestige is concerned the work will make its bow to the public under the most favorable auspices. After mature deliberation we decided to adopt the term 'Abridgment' for the nomenclature in preference to Encyclopædia, Digest or Epitome. There was in this respect the sanction of tradition — a great matter here in England — for was not abridgment the term used by Viner and Bacon to describe their historic labors? The publishers and myself, after consulting with a number of leading lawyers, have determined to limit the extent of the work to twelve volumes of five hundred pages each; in the case of many subjects it will naturally be very difficult to restrict their treatment within limits proportioned to this general scope, but almost every practical advantage is on the side of keeping the work within manageable compass, notwithstanding the obvious temptation to secure exhaustive statement by increasing its size.



A. WOOD RENTON.

"The absolute rule for contributors will be the omission of all antiquarian elements and narratives purely historical. We shall insist upon a simple, straightforward delineation of the rules of law as they exist at the

* The Boston Book Company will be the American publishers.

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present time; and by a faithful adherence to this idea we consider that the twelve-volume scheme should meet most practical requirements."

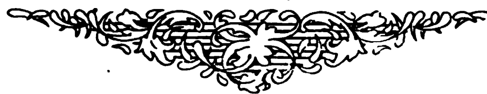
In response to my inquiries regarding patrons and contributors, the editor's face brightened as he said, "I have been marvelously successful in securing the most influential and valuable support. The Lord Chancellor, Lord Halsbury, has most kindly agreed to accept our dedication, while Lord Justice Lindley, Sir Edward Fry, and many other distinguished men, have intimated their sympathetic interest in the progress of the enterprise. Sir Edward Fry, Sir Frederick Pollock, Sir Wm. Anson, and Sir Howard Elphinstone are giving my pages the cachet of their contributions, and even already I have obtained promises of assistance from a number of the leading specialists. I should perhaps have mentioned that we are resolved so far as possible to have each article done by a man qualified for the task by study or experience. Thus Mr. Crump, Q. C., editor of the 'Law Times' has agreed to write ——; Mr. Thomas Snow the principal editor of our 'Annual Practice,' will write on Procedure; Mr. Blake Odgers, Q. C., upon Libel and Slander, and Pleading; Mr. Lewis Edmunds, Q. C., upon Patents; and a host of well known names are in like manner down on my list of contributors."

"Will you write much yourself, Mr. Renton?" I queried.

"Not a very great deal," replied the editor. "I shall write the article Arbitration, for instance, a subject I have had occasion to know a good deal about, and in any case the article Lunacy. I am now seeing through the press the proof-sheets of a comprehensive treatise on the Law of Lunacy upon which I have spent the labor of several years, and I should therefore naturally elect to contribute any article on the subject."

As to circulation the editor expressed himself in most sanguine terms. The publishers have been, from many indications, encouraged to expect a widely extended professional favor; indeed, as Mr. Wood Renton put it, everything will turn upon the way in which the work is done. The scheme in itself is a splendid one, and if skillfully carried out almost every lawyer in England and numbers elsewhere will desire to have a copy of the new abridgment.

Before I bowed myself out I ventured to hint that it was a big piece of work for so young a man to superintend, and faltered out something about experience and so forth. The subject of the portrait which heads this article smiled, and modestly aquiesced in the general drift of my observations. "However," he continued, "when I was editor of the 'Law Journal' I learned a good deal about the characteristics and habits of the legal contributor, and whenever my own judgment falters I can rely on the willing counsel of many a learned friend.



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AN ASSASSIN'S PLEA.

By Irving Browne.

AN English expert in chirography, who reads the characters of men from their writing, has recently discovered that the first Napoleon must have been a prodigious villain because he wrote such an abominable hand. On similar reasoning this ingenious gentleman must come to the conclusion that Rufus Choate, Horace Greeley and David Dudley Field were exceedingly vicious persons, for they certainly wrote atrocious hands. I have in my possession a manuscript, exceptionally uniform, fluent, legible and elegant, which is the writing of a half-lunatic and an assassin — the writing of Guiteau! Not one lawyer in a score writes such an excellent hand. It is as good as Garfield's and not greatly inferior to Lincoln's. The MS. is quite extensive, and is mainly in a law-clerk's stiff writing, but it begins with and contains many additions and alterations in Guiteau's own hand. It is the draft of the opening speech which he proposed to deliver to the jury, in his action against James Gordon Bennett, for a libel published in the New York "Herald," for which he claimed $100,000 damages. At the beginning he writes: "I shall deliver this from memory with all the power and pathos I can command. C. J. G." He left the document in the law office of the Hon. William Henry Arnoux, of the city of New York, in the endeavor to see him and secure his services as counsel on the trial of the cause; but they never met, and the action never came to trial. This was in 1874. In this paper he gives a pathetic account of his struggles in Chicago, where at length he had acquired a professional income of $2,000 a year, when his practice was ruined by the great fire, and he came to New York with only $10 in

In the Supreme Court
City & County of New York

Charles J Guiteau
agt
James Gordon Bennett } Opening Speech

I shall deliver this, from memory with all the power & pathos I can command. C. J. G.

FACSIMILE OF GUITEAU'S HANDWRITING.

his pocket. Here he had just become able to keep his head above water, when the "Herald" destroyed his budding prosperity by the cruel article in question. The speech is perfectly coherent and logical, and exhibits a considerable degree of vigor, tact and adroitness, although an erratic and unprincipled idea crops out here and there. For example: one of the "Herald's" charges was that he had collected money for clients and appropriated it to his own use. Guiteau defends himself against this accusation by explaining that he had written to his client as follows: "All respectable lawyers retain one-half for such collections. I have collected my half, and therefore nothing is due to you;" but he promised that just as soon as he could collect his client's half he would remit it! This is a traditional jest in law offices, but Guiteau seems to consider it seriously and with no apparent sense of its absurdity. The court, it seems, did not agree with his view, and granted an application for an attachment against him for the non-payment of half of what he had collected, and it was a report of this proceeding that constituted the "Herald's" article in question, headed: "A Profitable Collecting Lawyer"—"sarcastically meaning plaintiff," adds Guiteau. He complains that the "Herald" did not publish his letter explanatory of the circumstances as above set forth. He gives the Bennetts a vigorous scoring. Of the elder he says: "He blackguarded everybody and everything. He held nothing sacred. He ridiculed God and man. He filled it with sensations. The grosser elements in society bought the 'Herald,' read it, and circulated it. Little by little it gained power, fame and wealth. Mr. Bennett left six million dollars, and the largest circulated and the best paying newspaper in America, to his son, this defendant, every dollar of which he made out of the 'Herald.' He grew rich by ruining private reputations, by poking fun at decent people, and the 'Herald' has been at it ever since. The 'Herald' of to-day is run as it was forty years ago: like father, like son. A sensation, or something to make people laugh, is the 'Herald's' demand. 'We will libel any man we please, we will make fun of him, we will call him a fool and a thief (*sic*), and take no chances. If pursued, we will pay one hundred thousand dollars, but we make no retractions.'" The result of this promulgation by the "Herald," Guiteau says, was the ruin of his business, and his incarceration for thirty-six days for an unpaid board-bill. This "paralyzed my ambition." "Were you ever in that position, Mr. Juryman, and you, and you, and you, Mr. Juryman?" he inquires. "I had no money, and no relatives in the city, and I languished in prison for over

So I went to the St Nicholas with the result already mentioned. At a cheap place you have to pay in advance. At a first class place they present their bills at the expiration of the week. I hadn't a cent & had to go where I could get trusted or starve.

FACSIMILE OF GUITEAU'S HANDWRITING.

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five long and dreary weeks, hourly and daily expecting, hoping and praying for my release, as I knew any detention was wholly illegal. Finally it came, thank God! *I was free again!* Free to breathe the sweet air of heaven! Free to go and come! Free to do my own will! Free to eat, drink and sleep like decent people, and associate with them!" He alleges that in his imprisonment he wrote "letters of distress" to prominent lawyers and politicians, who had "known him in his days of prosperity," but their minds had been "poisoned" by the "Herald's" virus, and "they failed to respond." He describes in a *naïve* manner how he came to owe this board-bill. He "went to the St. Nicholas hotel on a cold, rainy night in December, '74, without a cent. I had nowhere else to go," because he had been black-listed as a boarding-house swindler. Then in a rider, in his own writing, he continues: "So I went to the St. Nicholas hotel, with the result already mentioned. At a cheap place you have to *pay in advance*. At a first-class place they present their bills at the end of the week. I hadn't a cent, and had to go where I could get trusted or *starve*." Some method in that madness.

Such is the piteous tale of this modern Robert Macaire.

A BLACKSTONE CHRISTMAS EVE.

FOR anyone twenty years ago in the City of New York to confess himself ignorant of the law-firm of "Briefner, McMahon & Cuming," was to admit himself unknown. Those were not the days of twenty-storied sky-scrapers, or doubtless their offices would have been more elaborate and more expensively furnished than these were at the time when this story opens in the building on Cedar Street, near Broadway, which those offices occupied. Briefner, senior partner, was gifted with exquisite taste, and had furnished his own chambers and the adjacent ones of his partners with desks, chairs, closets for papers and documents, settees and book-cases, that were all made of the best Honduras mahogany. Their grates for the consumption of cheerfully flaming bituminous coal were artistically tiled at the sides; and even in summer weather seemed to glow pleasantly. In the working-chamber of the senior partner hung a fine line engraving of Lord Chief-Justice Mansfield and another of Federal Chief-Justice Marshall side by side; and each greatly worshipped by Briefner because, as he often remarked to partner McMahon when the latter found it difficult to surrender views, "Each of them was so just as to have reversed his own previous opinions. Señor Jerome Ravel of the Niblo acrobatic troupe" Briefner would sometimes add, pointing toward the pictures, "was not the only man who could reverse himself under the public gaze."

Briefner was of course the oracle of the firm; McMahon was its cajoler of juries and the magnetizer of judges on motion days; while Cuming "ran the office" as pleader, conveyancer and supervisor of the fat registers which attested the great business of the law-firm with clients. To employ B. M. and C. (as the form appeared on Court calendars) was to win a case *ab initio*; and many a hush retainer it received merely to remain neutral in a *cause célèbre*. The managing clerk was a brisk, shrewd attorney (who had been a London solicitor in his younger days) named Gideon Billings, who was so rigid in exacting that a lawyer should never bother about anything outside of his profession, that he always eyed the picture of Chief-Justice Marshall askance and negatively shook his head at it, because, as Billings said, "that jurist had once wasted his time by writ-

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ing a biography of George Washington."

One room among the firm's array of offices, which covered three stories, was devoted to the law-students, then six in number, the father of each one of whom had paid an entrance fee of five hundred dollars: so frequent were the clientular applications for the privilege of studying law with the great firm that it insisted upon this fee to escape importunity. Among these law-students was Michael Sandford, who, the son of a poor Irish widow, had entered the office as an errand-boy; but having shown extraordinary talent for penmanship and fancy pen-drawing, had been first duly promoted as copyist, but was now the stated scrivener and permitted access to the well-appointed library and regarded as a student as well as employee. He was — so Managing Clerk Billings protested — "afflicted with ambition and was moreover a disciple of the new-fangled spiritualism with its folly of mediums, appearances from the other world, and kindred superstitions." The scrivener was, however, devoted to the office, and often had to be at eventide fairly turned out of it by the garrulous old woman who officiated as sweeper and char-woman. Whenever his pen had discharged its duties he was fain to remain and dip into the law-books. His passion was for Blackstone; and out of his salary of twenty dollars a week he had purchased for the room assigned to him a fine old line and stipple engraving of Sir William and also as many of the editions of his commentaries as existed. His last purchase had been the four volumes edited by Kerr, the Recorder of London, which, under favor of brackets, contained the later law of the period and excluded whatever was obsolete. On the shelf of his desk were also volumes edited by Chitty, by Christian, by Tucker, by Wendell, by Sharswood, by Archbold, by Williams, by Bagley, by Broom, by Kingsford, by Reed, by Cooley and by Waite. Indeed Billings would often whisper to others in the office, "That youth Michael is Blackstone mad."

Our story opens on the evening before Christmas Day before the era of type-writing and telephones. In anticipation of the holiday week coming and the necessary hiatus of court service or in business, the work of the office had been much driven. Michael was in the act of concluding the engrossment of a mortgage when Billings, redolent of Younger's ale and biscuit, came out of the room of partner Cumings, and laying on the scrivener's desk a formidable array of manuscript, said, "Michael, I'm sorry to say that we must keep you here several hours to-night for engrossing work; one of our best clients, old Reuben Moneypenny, who has had a severe fit of gout and is in a very nervous condition has taken it into his head to again alter his testamentary views and has given instructions for an entirely new last will. Here are his instructions worked into ship-shape and duly revised by our Senior; and old Moneypenny insists upon executing it to-morrow morning; saying that a will executed on a Christmas Day is bound to have good luck in its probate and executory matters after his decease. He is, as you know, very fastidious and you must put your best old English capitals into the copy and push your best pen forward without a blot or of course an erasure. For your detention I am authorized to give you this extra," and he dropped on the desk a gold half-eagle.

Michael's eyes brightened; for he had that day fallen in love with a sealskin muff which he had thought would be so good a Christmas present for his dear old mother; and now the coin would go far towards buying it.

I shall meet you here at nine o'clock and together we will go up to old Moneypenny's house in Lafayette Place and become witnesses. You can, I fancy, easily finish the engrossing before Trinity chimes usher in Christmas day. Therefore do up the will in your best style, but no black ribbon, or black ruled lines, nor black sealing-wax, such as

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were lately appended to the will that we presented to Ralph Murgatroyd, and the sight of which funereal document nearly frightened him into postponing its execution lest he should be signing his death-warrant."

When the manager took his departure Trinity clock was striking the hour of seven. Taking up the manuscript and weighing it in his hands in a clerkly sort of way and counting the sheets, Michael remarked to himself—" A tidyish job; but I've got the whole night before me, so now for a good repast at Florence's café after buying the muff. The dear old mother shall have a merry Christmas with it." Then pocketing the key of the outer door he sallied into the crisp December air on his errand.

Returning in about an hour he found some difficulty in adjusting his key and chaffingly thought, "That generous glass of egg-nog which I drank in honor of old Christmastide was a little too lively."

The liveliness followed him to his desk and to a relighting of his gas droplight. " By Jove," he added as the bright flame reflected upon the Blackstone picture, "I could have sworn that the old Judge was winking at me. I wonder if he ever gave to barristers any commentaries upon egg-nog at Christmas time at the Mitre tavern, where the gravest pundits of the Middle Temple near its entrance often met. " Here's to you, Sir William, and a merry Christmas to you wherever in the spirit-world you may be." And the merry scrivener went through the pantomime of raising an invisible second glass of egg-nog to his lips.

But he began his engrossing job with a light heart, and never was the traditional phrase " In the Name of God, Amen" better done in old English text at the beginning of a will during the olden time of Coke and illuminated text than in the present effort of Michael Sandford.

Once or twice he came near writing the word egg-nog at the end of some bequeathement; but happily escaped realizing the suggestion. A blot at the bottom of the first sheet caused him to recommence again.

A few moments of puzzle over whether he should follow the spelling of "devizes" in the manuscript before him or accept the modern substitution of an "s" for a "z"; and divers pausings for reflections and thoughtful soliloquies over the context he was transcribing, and especially upon the phrase " to my beloved daughter on her marriage," led to many delays; so that eleven o'clock struck from the Trinity tower before he had completed his task. As he did so, his eye glancing up again at the Blackstone picture caught Sir William apparently "winking his other eye"; and at the same moment a jostle of his arm caused a book to drop from the desk to the floor. Stooping to pick it up he saw it was the volume of Blackstone containing, as he knew it did, the commentaries on the acts and property of decedents. Turning to the pages as apropos of his labor he began reading almost mechanically. Soon the types of the page began to dance a sort of Christmas reel before his eyes and he felt the back of his head inclining toward the high rail of his office-chair in a sort of delirious doze; while thoughts of Sir William Blackstone and the spiritual seances he had lately attended curiously fleeted across his brain.

Presently a hard breathing at his right side somewhat aroused him from his somnolence and he slightly turned his face toward its direction. There seated, on a chair, was the face and figure of the picture, except that Blackstone's wig was now awry with a very comical effect. Looking upward at the picture the scrivener saw now only an empty frame.

" I suppose, Michael, you are surprised to see me just as I was in the flesh. How are you, my boy? We have long been tacit friends, and in my spirit home I often reflect upon your worship of me."

Michael was not only a Spiritualist but a Swedenborgian; and so the appearance of

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his familiar legal deity did not appall him as it might have appalled another. On the contrary, he arose, and, making a low bow, observed: "Sir William, I wish you a merry Christmas."

"I have come upon earth again to enjoy such an one; for our Christmases in the spirit world are monotonous. The planet Venus is now my home; and thither is the community of lawyers to be found; soldiers are bivouacked in Mars, and literary men in Mercury; but communities can visit each other often; for in what you mortals keep on calling the next world — and yet there is only one world of separate divisions — there is neither space nor time. We wish to be in a place and straightway we are there. Michael, I take the deepest interest in you for your fidelity to my memory, and all throughout your life here you shall enjoy my influence. Do you know, I'm going to make a great lawyer of you. In any legal question arising you will have but to summon me in your thoughts, put it, and it shall be answered. With me at your side and my commentaries always in your view, you shall never require a library.

"But what is this stuff? Get rid of it!" and the ghost picked up a volume of the Kerr edition. "Faugh! the idea of anyone presuming to doctor my text. Notes are all very well; and so are additional cases such as Chitty and Christian and Wendell and others have gifted me with; but my immortal text itself is sacred."

"Quite so, quite so!" responded the scrivener, now feeling thoroughly at home with the ghost. "I will banish Kerr."

"Not that he is a cur," interrupted Blackstone with a self-conscious grimace at his pun.

"However, I fancy," broke in the scrivener lifting the lid of his desk, "that you will not find fault with this, which I hide away for safety;" and he produced an original edition. "I bought this at an auction. Observe how many autographs of owners it has had."

The ghost took the half-mouldy old volumes and fervently kissed the mahogany hued, aged covers, saying, "It is long since thou and I have met."

"Sir William," asked the scrivener, now wholly at his ease, "do you often visit the sublunary?"

"It is my delight. I journey (as you mortals would say, yet there is no journeying, because we spirits flit as swift as sun-rays fall) from Europe to America daily, enjoying the offices of lawyers and judges and watching court procedures. Ned Coke is with me sometimes, but he is unhappy. He dislikes the progress of things legal; but I hail it with delight. I love American legal ways the best. I am really better known and reverenced here than in my native land. But you Americans are true hero-worshippers. That which disgusts Ned Coke in our flittings and confabs is to see how his real-estate views have been obliterated by statutes and customs. Fact is, Coke is jealous of my immortality."

"Then you see nothing in American Jurisprudence and our legal science to find fault with, Sir William?"

"Yes, I do. For instance, your judges spawn too many opinions and too long ones, and you publish too many court reports. Then what with your encyclopædias you are making the practice of law a trade and ruining it as a profession. Almost any clever-brained fellow owning one of these encyclopædias can rush into practice as a lawyer, while ignorant of foundation principles such as I aimed to teach. Don't you know, for instance, that every offense mentioned in your modern penal codes is simply an offshoot from the foundation offenses comprehended in the ten commandments? Remember this, Michael, in your career at the Bar: don't ever become a case-lawyer, nor ever forget this maxim as the foundation of legal decision in law or equity: '*Eadem ratio ibidem lex*.' The 'tis so's should always be questioned by whys and wherefores. But

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which part of my commentaries do you prefer?"

"I answer that, Sir William, by another question: What is the pre-eminent leaf upon a gorgeous old oak in springtime? But if I can differentiate your pages at all, I give selection to your incomparable history closing the fourth part."

"Yes; I flatter myself that no one else has given to the world a more comprehensive and concise survey of English legal history down to my time. Your modern historians deal too much with detail and too much disdain philosophy, and in designating effect deal too little with cause."

"Do you dislike our American simplicity of legal toilettes and absence of judicial pomp and circumstance, such as you were accustomed to when judge of the Common Pleas?"

"Ah, your query excludes reference to the differing conditions of the English and your people. The simplicity of the Wesleyan church would never suit Italy, for instance, in religious matters, nor would your simplicity and variety in the dress of lawyers and judges, or the off-handedness of jurors and witnesses, chime with the English fondness for rank and ceremony. London must be remitted to its wigs and stuff or silk gowns; while New York or Boston or Chicago can be left to allow a judge to hold court in a cut-away coat and lavender-hued trousers, or a lawyer to argue before a jury in a capital case when wearing a red cravat."

A gentle shiver passed over Michael, for he remembered that he was wearing a red tie himself, and had been that afternoon chaffed about it by Hugh Fowler, one of the law-students. He put his hand up to his neck to loosen it, for he felt somewhat chokingly, when he also felt a hand on his shoulder. He started, for had Sir William as a spirit a power of tangibility? and he exclaimed, "What is it, Sir William?" as a merry peal of laughter sounded in his already startled ears.

The scrivener looked around and saw not Sir William Blackstone, but the managing clerk, and a second glance showed him the picture on the wall intact; while Billings was scarlet in the face with the effects of his mirth.

"Why do you babble about a Sir William? Michael, my boy, you've had a nightmare. Here it is nine o'clock, and you fast asleep in your chair, gaslight full on, and Trinity Church bells ringing like mad. What is the matter? And have you forgotten the will?"

The scrivener rose from his chair half-dazed, but pointed to the engrossed copy exultingly.

"Mr. Billings, the egg-nog was too much for me. I must have fallen asleep after finishing my work, and slept most of the night through. But no nightmare, and a most delightful dream."

Kissing his hand to the Blackstone picture, — Billings saying to himself, "The boy's spiritualism and Blackstone worship has made him madder than ever," — Michael folded his engrossed copy of the will, and the two departed to the execution of the last will and testament of Reuben Moneypenny. During the Christmas day he drank another glass of egg-nog to Blackstone and his supposed dream. And when reaching home and finding his old mother in tears at his night's absence, but soothed by the arrival of the well earned muff as her Christmas gift, he confided to her his interview with Blackstone. She turned aside with an exclamation, "And of course it was only a dream." But ever afterward, with a new picture of Blackstone in his Chamber, he contended that the old commentator had indeed honored him with a valid spiritual manifestation, and Michael Sanford is one of the best recognized disciples of Spiritualism to be found anywhere in the city where he is now an approved practitioner, and remarked by his brethren and by the Bench to possess unerring intuitions of legal principles at every professional occasion. But none of them know the incidents of that BLACKSTONE CHRISTMAS EVE.

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LONDON LEGAL LETTER.

LONDON, Nov. 4, 1896.

THE Michaelmas term of the courts opened with the usual pageantry and ceremony on the twenty-sixth of October. It should have dated from the twenty-fourth, but that was a Saturday, and as all Saturdays are, nominally, half-holidays and, practically, *dies non* in the court calendar, the wheels of justice were not permitted to start their revolutions until two days later.

On Monday, the opening day, there was the annual breakfast by the Lord Chancellor at the House of Lords, to the judges; and then, about noon, these judges, accompanied by the Queen's counsel, made a procession through the great hall of the Royal Courts. In anticipation of the ceremony the usual throng gathered; only the members of the bar, however, and certain solicitors and their guests, being admitted. It is wonderful what an attraction the spectacle of the judges, robed in scarlet vestments, and Queen's counsel in full-bottomed wigs and short breeches, silk stockings, and patent leather slippers with old-time silver buckles, has for the masses — and "the classes" also.

As this ceremony of opening the courts, although it occupied a comparatively few minutes, was the entire work of the first day of the term, there was a good deal of grumbling. Nearly twelve weeks had been given over to holiday much against the wishes of the junior bar, and yet here was an entire day abandoned to a ceremony that might easily have been got through with on the day fixed by the rules for the opening of the term.

Nothwithstanding this grumbling, the new term starts out with a good deal of encouragement for the younger members of the bar who look to it for their income. The lists show a decided increase in the volume of litigation, the total number of causes and appeals being 1,929, which is 344 in excess of the number at this period last year. It may interest American lawyers, who, for comparison, can gather similar data from the dockets of their own courts, to have some figures as to the character of this litigation. For instance, there are 195 more chancery causes than last year, and 240 more common law actions; while in the Probate and Divorce Division the number has fallen to 149 against 261 last Michaelmas sittings. Some light is thrown on the regard which is had for juries by the fact that of the 783 common law actions set down for trial, no fewer than 326, or nearly one-half, are marked "non-jury"; while of the 440 cases in which the aid of a jury is invoked, 240 will be tried by special and 200 by common juries. Generally speaking, the cases are of a more substantial character, there being only thirty actions for damages for "personal injuries," 22 for libel, 12 for slander, and 4 for breach of promise of marriage. This is certainly encouraging, and would tend to show that adventurous litigation is at a discount, and that the courts are again coming into favor in cases of commercial and mercantile disputes.

While on statistics of litigation, it may further be of interest to know that by a return made to the House of Commons it is shown that during the year 1894 the total number of divorce cases tried was 443. Of these 205 were instituted by wives, and 238 by husbands. The wives were successful in 196 cases, or .956 per cent of those brought, and the husbands in 209 cases, or .878 per cent of those instituted by them. As the law in this country obliges the wife to prove either crueltry or desertion in addition to adultery, and the husband adultery only, the inference from these figures is largely in favor of the wife.

During the long vacation just closed, one of the daily newspapers opened its columns to the "Grievances of Lawyers," and the letters which were published show that there is some ground for complaint, at least among solicitors, at the small returns the practice of the profession yields. It was stated by one complainant that it costs, roughly speaking, to become a solicitor, about £1,000, and often a good deal more. The government, upon admission, exacts a fee of one hundred guineas, or the close equivalent of $500. Five years have to be spent under articles, during which time he may not be engaged in any other occupation, and three examinations have to be passed. These examinations are most rigorous, — in fact they are considerably more exacting and cover a wider range of subjects than those which candidates for the bar are required to pass. Those who have put up this money and gone through the three years of office training, and have succeeded in the examinations, have practically only two avenues open to them in which to earn a living in the profession. They must either put up still more money, and this time a very much larger sum, to buy a partnership in an established firm of solicitors, or a business, or they must take a salary as a solicitor's clerk. The latter sometimes leads to a partnership, but, unless fortune is very favorable, only in exceptional cases. Starting out for oneself to practice law, as the fledgling in the United States "hangs out his shingle," is practically impossible. The only alternative, therefore, is the clerkship. What the rewards of such service are may be gathered from a recent advertisement in a law journal: "Wanted, admitted solictor, as clerk. University man preferred. Salary commencing at £75"; or another, in which a university graduate offers his services with a nine years' experience as a solicitor, for a salary of £50 to £100. This is about eight to ten dollars a week, or what an inexperienced clerk in a dry-goods store expects. It is certainly not what a man who has spent four years at a preparatory school, three years at a university, and three years in a law-office, should be able to command. The cash capital invested after leaving the university ought to produce more if laid out in government bonds. The correspondence, of course, had no practical result. The trouble lies in the constitution of society, and that is not likely to be overturned by a revolution in the columns of a newspaper. The social position of the attorney or solicitor has been constantly advancing of recent years, and the successes of those who succeed have been greater than in past generations. The natural consequence is a rush into the field of a polite calling for the few prizes that may be found there. In the meantime, the costs of litigation are deterring litigants, while laymen, such as estate agents, accountants, and land transfer registrars, are more and more taking away work which heretofore has been the exclusive function of solicitors.

STUFF GOWN.

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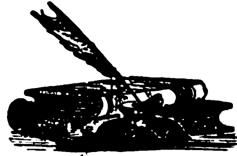
The Lawyer's Easy Chair.



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

BY IRVING BROWNE.

CURRENT TOPICS.

THE WHEEL OF TORTURE.

(Town of Davis *v.* Davis, 40 W. Va. 464.)

A HORIZONTAL circular frame,
Just raised above the ground,
With seats for people on the same,
Or hobby horses on the bound,
Revolved by steam at high velocity,
Stirred up their stomachs with atrocity.

It whirled till ten o'clock at night,
The riders screamed in raillery,
And music played, and its noisy flight,
Applauded by the gallery,
With screeching of the fell steam-whistle,
Made hair of neighboring dwellers bristle.

It roused them from their early dreams,
And kept them long awake,
In dread of more unearthly screams,
Until their heads did ache:
Such is imagination's power
O'er nervous folk at midnight hour.

The sufferers at length complained
Unto the town authority,
Praying the nuisance be restrained;
And by a large majority
That wheel of torture was abated
Instead of being regulated.

Two of the judges thought this right;
But other two dissented —
They deemed at ten o'clock at night
People should be contented
To lie awake in summer weather
While pleasure-seekers flock together.

"The engine was a business lawful;
They might prevent the noise;
And really there was nothing awful
In shouts of girls and boys."
They jeered, with sarcasm worthy Dickens,
At folks who "went to roost with chickens."

Opprobrious epithets they hurled:
"Hysterical, phlegmatic,
"Captious, complaining" of the world,
Such were their words emphatic;
And out of breath, their railing ends
With this: "a heaviness to their friends."

To stop the whistle and the music
Is easy, we concede;
But though the shouts made very few sick,
Those few their slumber need;
And no injunction could suppress
Those screams and yells, or make them less.

"Bottom" might mitigate his roar
To tones of nightingale;
But if one lets his fancy soar
He knows that he must fail,
Except by gags or opiate diet,
To keep a mob of children quiet.*

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* PUBLIC picnics and open-air dances are not nuisances *per se*. "When conducted with decorum and circumspection, and remote from public thoroughfares," they are permissible. So an ordinance forbidding them was held invalid (Village of Des Plaines *v.* Poyer, 123 Illinois, 348). But it was conceded that "the manner of conducting them may be productive of annoyance and injury to the public." The English courts in certain circumstances regard a brass band and fireworks as a nuisance (Walker *v.* Brewster, 5 Eq. 25); and so a circus (Inchbald *v.* Robinson, 4 Ch. 388); and so even a dancing-school (Sturges *v.* Bridgman, 11 Ch. Div. 852); and a singing and instrumental music school (Christie *v.* Davie [1893], 1 Ch. 316).

CANADIAN NOTIONS. — In the October number of the excellent "Canadian Law Journal" we find two things, in the form of comments on Lord Chief-Justice Russell's recent address at Saratoga, that make us smile. First, after quoting his Lordship's aspiration for lasting amity and peace between England and the United States, the "Journal" remarks: "This end will be facilitated, as far as Canadians are concerned, by the frank recognition by our neighbors of the fact that we are here on this continent to stay, not as a part of the United States, but to fulfil our destiny as a separate nationality, and that all schemes to coerce the political sentiment of the country in favor of annexation, while they are certain to obstruct free and friendly intercourse, are

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equally certain to fail of their object." Annexation may fail so long as the present editor of the "Journal" dictates its politics; but how if an annexationist should hereafter occupy his stool? Seriously, our Canadian brothers are unnecessarily worried by the ghost of annexation. They remind us of Byron's woman who asked, "When will the ravishing begin?" This nervousness of the Canadians recalls to us an incident in a theater, where a very uncomely maiden, straying at night in a forest, exclaimed, "I'm afraid to be alone in the dark." To which a god of the gallery responded, "No danger in your case, Miss!" Nobody here wants to annex them so long as they prefer to be tied to the apron-string of the good mother-country. We have plenty of trouble here with our own mixed population, without desiring to add a mixed English and French country; and lawyers especially would not welcome courts carried on in the French language. (One of the addresses at the late meeting of the Canadian Bar Association, the proceedings of which are recorded in the same number of the "Journal," was delivered in French.) If our hyperborean brethren are content with the degree of prosperity which attends them, let them wrap themselves in their fur coats, pull down their ear-flaps, and hug themselves in their pleasing fancy. We would not be at the expense of disturbing them, for at some future day they will inevitably gravitate to us. Second: the "Journal" very pointedly takes the Chief Justice to task for speaking of the Pope as "the head of Christendom" — "when the influence of the head of Christendom lessened," was his precise phrase. The "Journal" says "England is a part of Christendom," and "the King or Queen of England is head of the church so far as the British Empire is concerned." That is the notion of the Protestant part of the British Empire, no doubt, but the Chief Justice expressed the notion of the Roman Catholic part. It is a mere matter of opinion and taste, and we have no fault to find with him on the latter score, for speaking of the Pope, at the time in question, as the head of Christendom, rather than of Henry Eighth. Moreover the learned editor seems to be forgetful that a large body of Canadians would entertain the same opinion and employ the same phrase. But there can be little question that the Chief Justice is right, speaking historically, in considering that the Pope was much more nearly "head of Christendom" than the King of England. It would require a robust imagination even now to regard Queen Victoria as the "head of Christendom." We might as well set up a claim for our own President.

A Wreck of a Man. — The "Chicago Evening Post" gives an account of a declaration filed by Oakley H. Creel in an action against the Chicago & Rock Island Railroad Company for personal injuries. The plaintiff was a brakeman in the employ of the defendant, and if his statement is accurate he is also a broken man, and the worst broken known to the law. The names of his attorneys are not divulged. This is to be regretted, for we should take real pleasure in handing down the names of the ingenious gentlemen to future ages, and commending their statement as a precedent in almost any kind of a case of corporeal injury. The following contains the meat of the matter: —

"And the plaintiff avers that owing to the broken and defective condition of said stirrup as aforesaid, in manner aforesaid, the said loosened and unsecured end of said stirrup was by the weight of the body of said plaintiff when the plaintiff stepped upon and into it as aforesaid, pushed, forced and swung around under said car, so that the foot of said plaintiff then and there slipped and was forced off said stirrup, and he, the said plaintiff, without his fault, violently and with great force fell and was thrown down under the said car and upon the track and roadbed of said railroad, and was struck and run upon and against and was dragged for a long distance, to wit, 500 feet, by said car; and the plaintiff then and there by reason of falling and being thrown down and struck and dragged by said car as aforesaid was paralyzed in the left leg and his left hip was thrown and forced out of joint and his spine injured, and he was otherwise then and there greatly bruised, hurt, wounded and the bones of his body broken, to wit: The bones of his legs, to wit, the bones of his right leg, the bones of his left leg, and the bones of his ankles, to wit, the bones of his right ankle, the bones of his left ankle and the bones of his feet, to wit, the bones of his right foot, the bones of his left foot and the bones of his shoulder joints, to wit, the bones of his right shoulder joint, the bones of his left shoulder joint and the bones of his neck and the bones of his wrists, to wit, the bones of his right wrist, the bones of his left wrist and the bones of his hand, to wit, the bones of his right hand, the bones of his left hand and the bones of his back and of his body, and he was permanently injured in the organs of his body, to wit, in his right lung, in his left lung, in his spleen, in his stomach and in his bowels; and he was greatly and permanently injured in his senses, to wit, in the sense of sight, the sense of hearing, the sense of smelling, the sense of feeling and the sense of taste; and he was greatly and permanently injured in his right eye, in his left eye, his right ear, his left ear, his nose, his mouth, his tongue and his fingers, and in the power of sensation of his body; and he was greatly and permanently injured in his brain, to wit, the matter of his brain, and in his mind, to wit, his reasoning faculties, his judgment, his imagination and his mental processes; and he became sick, sore, lame and disordered, and so remained for a long space of time, to wit, hitherto, during all of which time he, the plaintiff, suffered great pain and agony of mind and body, and was and is hindered and prevented from attending to and transacting his personal affairs and matters of business, and by means whereof the plaintiff was compelled and forced to and did incur

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sundry and divers expenses and laid out and spent large sums of money, amounting to $2,000, in and about endeavoring to be cured of his said wounds, hurts, bruises and fractures occasioned by the said defendant as aforesaid.

There is nothing to equal this summary except the anathema of the church, as set forth in "Tristram Shandy." One omission, however, is noticeable. Nothing is said about damage to the sufferer's nerves. So much injury must have worked permanent detriment to his nervous system, entailing the most exquisite form of suffering, including insomnia. (It is highly probable that his lawyers must also have suffered from insomnia — they must have "sat up nights" to invent this statement.) Certainly something ought to have been alleged on behalf of the ganglion.

THE BARON'S AUTHORITY. — The "London Law Journal" says: —

"Marital authority was generally supposed to have been finally exploded by the *Jackson Case*, but the learned editors of the new edition of 'Chitty on Contracts' hold out a hope that the husband is not reduced to quite such a state of connubial impotence as was thought. Suppose a wife, for instance, wants to become a singer, actress, or schoolmistress, or to go out to service, or to enter into any other contract which would take her so much away from the conjugal domicil as to interfere with the matrimonial relation, could she do so without the consent of her quondam lord and master? The editors of 'Chitty' say No. In these days of stage aspirations this may easily become a burning question. When Sheridan married the beautiful Mrs. Linley he would not allow her to sing in public, though he might have made thousands by doing so; and Dr. Johnson applauds his spirit. But what will the new woman have to say to this? We tremble to think of the scene when the stage-struck Angelina announces her intention of going to see a manager, and Edwin authoritatively says No! In France, it seems that a husband's authority to his wife taking a theatrical engagement is so essential, that if he objects, no judicial sanction can supply the want of consent."

It would seem that in this country generally this question would be answered, Yes! The New York statute, which is the type, as we understand, of that of a considerable number of other States, enables the emancipated wife to perform any labor or services on her sole and separate account, and to hold her earnings therefrom as her sole and separate property. The "new woman" may deliver her "Caudle Lectures" in public, if she will, and if anybody will listen; and she is doing it to a large extent. We have long since outmarched that mirror of domestic virtue, Sheridan, and that amiable censor of morals and manners, Sam Johnson. As Yankees, we may be permitted to "guess" that even if a British wife sees fit to become an actress, singer or schoolmistress, the British courts will not deem it a case of "misbehaviour," and will brush away the husband's objections as summarily and contemptuously as they did in the *Jackson* case, where the husband sought to imprison his reluctant wife and compel her to live with him. The only safeguard, as it seems to us, is for a man to marry a woman so sensible and affectionate, and to be to her so kind and considerate, that she will feel no temptation to sing or play to or teach anybody but her own children.

NOTES OF CASES.

INSURANCE — FORMER, BUT INVALID. — It is an extremely vexed question whether insurance which is invalid by reason of prior valid insurance will defeat the prior policy under a provision against additional insurance. The question arose for the first time, and was decided in the negative, in Sweeting *v.* Mutual F. Ins. Co., Maryland Court of Appeals, 32 L. R. A. 570. The point is learnedly discussed, and the Court array the authorities as follows:

"It is this: Does the fact that a subsequent policy was procured without the consent of the first underwriter avoid the first policy, under the above quoted conditions contained therein, against other insurance, when the second policy explicitly declares that the company which issued it shall not be liable for loss if there is other prior insurance, whether valid or not, held on the same property, without the written consent of the second insurer? There is a wide diversity of opinion on this question in the various courts of this country. The doctrine laid down by the highest tribunals of Massachusetts, Pennsylvania, and other states is that the subsequent insurance being invalid at the time of the loss, by reason of the breach of condition therein, the prior insurance is good, and the first underwriter is liable on the policy issued by it. Thomas *v.* Builders' Mut. F. Ins. Co. 119 Mass. 121, 20 Am. Rep. 317; Allison *v.* Phœnix Ins. Co. 3 Dill. 480, Fed. Cas. No. 252; Fireman's Ins. Co. *v.* Holt, 35 Ohio St. 189; Knight *v.* Eureka F. & M. Ins. Co. 26 Ohio St. 664, 20 Am. Rep. 778; Stacey *v.* Franklin F. Ins. Co. 2 Watts & S. 506; Jackson *v.* Massachusetts Mut. F. Ins. Co. 23 Pick. 418, 34 Am. Dec. 69; Clark *v.* New England Mut. F. Ins. Co. 6 Cush. 342, 53 Am. Dec. 44; Hardy *v.* Union Mut. F. Ins. Co. 4 Allen, 217; Philbrook *v.* New England Mut. F. Ins. Co. 37 Me. 137; Lindley *v.* Union Farmers' Mut. Ins. Co. 65 Me. 368, 20 Am. Rep. 701; Gale *v.* Belknap County Ins. Co. 41 N. H. 170; Gee *v.* Cheshire County Mut. F. Ins. Co. 55 N. H. 65; Jersey City Ins. Co. *v.* Nichol, 35 N. J. Eq. 291, 40 Am. Rep. 625; Schenck *v.* Mercer County Mut. F. Ins. Co. 24 N. J. L. 447; Rising Sun Ins. Co. *v.* Slaughter, 20 Ind. 520; May, Ins. § 364.

"On the other hand, it has been held elsewhere that a subsequent policy, whether legally enforceable or not, or whether voidable on its face, or voidable for extrinsic matter, works a forfeiture of the prior policy. Carpenter *v.* Providence Washington Ins. Co. 41 U. S. 16 Pet. 495, 10 L. ed. 1044; Allen *v.* Merchants' Mut. Ins. Co. 30 La. Ann. 1386, 31 Am. Rep. 243; Somerfield *v.* State Ins. Co. 8 Lea, 547, 41 Am. Rep. 662; Funke *v.* Minnesota Fa'mers' Mut. F. Ins. Co. 29 Minn. 347, 43 Am. Rep. 216; Lackey

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v. Georgia Home Ins. Co. 42 Ga. 456; Bigler *v.* New York Ins. Co. 22 N. Y. 402; May, Ins. § 364.

"There is still an intermediate view, taken by the Supreme Court of Iowa in the case of Hubbard *v.* Hartford F. Ins. Co. 33 Iowa, 325, to the effect that the question of the validity of the prior policy turns upon whether the subsequent policy has in fact been avoided."

"FIREARMS."— Ordinary breech-loading Springfield rifles which have been altered so that they cannot discharge a missile by means of gunpowder or any other explosive, which fact is not obvious to the ordinary observer, are "firearms" within the meaning of Stat. 1893, chap. 367, § 124, prohibiting unauthorized bodies of men to parade with firearms. Com. *v.* Murphy (Mass.), 32 L. R. A. 606. The Court said: —

"It appeared in evidence that the defendant, with ten or twelve other men, formed one company in the parade, and that all the men in this company carried ordinary breech-loading Springfield rifles, which had been altered and bored in the barrel near the breech, and the firing pins had been filed down, so as to make them immovable; and in this condition they could not discharge a missile by means of gunpowder or any other explosive. The defendant contends that these weapons were not 'firearms' within the meaning of the statute. The purpose for which these alterations were made is not disclosed. They would not be obvious to the ordinary observer, while the rifles were carried in the parade. So far as appearance went, it was a parade with firearms which were efficient for use. To the public eye it was a parade in direct violation of the statute. The men who carried these weapons could not actually fire them, but it would be generally supposed that they could. With the exception of the danger of being actually shot down, all the evils which the statute was intended to remedy still exist in the parade in which the defendant took part. To hold that such a weapon is not a 'firearm,' within the meaning of the statute, would be to give too narrow and strict a construction to its words. It was originally a firearm which was effective for use. The fact that it was disabled for use did not change its name."

LIEN ON MORTUARY MONUMENT. — In Brooks *v.* Tayntor, New York Supreme Court, Special Term, 17 Misc. 534, it was held that chap. 543, Laws of 1888, giving a lien for the unpaid purchase of a mortuary monument, with power to remove it after erection, is unconstitutional as authorizing the taking of property without due process of law. The judge observed: —

"The act in question is almost without precedent in the legislative history of the state. It confers upon the lienors the right to go upon the plaintiff's burying plot and dig up and remove the monument and sell it at public auction without the consent of the owner and without instituting legal proceedings of any kind. In removing the monument they may desecrate the graves and disturb the remains of plaintiff's deceased wife and daughter, and the statute in question affords him no protection. The learned counsel for the defendants contended upon the argument that desecrating the graves is merely a sentiment, and that the act permitting it to be done is not against public policy. Conceding that it is a mere matter of sentiment, it is one, however, that has received the sanction and approval of mankind of all ages. Every civilized country regards the resting place of the dead as hallowed ground, and not subject to liens and to be sold upon execution like ordinary property. Courts of equity have always been ready to restrain those who threaten to desecrate the graves of the dead, and to protect the sentiment of natural affection which the surviving kindred and friends entertain for their departed relatives. It is a sentiment that the Legislature of this State recognized years ago by passing appropriate laws to preserve and protect the resting places of the dead."

DEFINITIONS — "PUBLIC ACCOMMODATION AND AMUSEMENT."— A drug-store, in which soda-water is sold, is not a place of "public accommodation and amusement," within a statute providing "That all persons within the jurisdiction of said state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, restaurants, eating houses, barber shops, public conveyances on land or water, theatres, and all other places of public accommodation and amusement." The Court said that "such places can be considered places of accommodation or amusement to no greater extent than a place where dry goods or clothing, boots and shoes, hats and caps, or groceries are dispensed." Cecil *v.* Green, 161 Ill. 265; 32 L. R. A. 566.

THE DANGERS OF OBITER. — If there is any doctrine that is disputed, and indeed discarded by a majority of courts in this country, it is that of the celebrated English case of Fletcher *v.* Rylands, L. R. 1 Ex. 265, that one who dams water on his own land, does so at his peril, and is responsible for its escape, to the injury of a neighbor, even if he is not negligent — the wild beast theory. This is said by the Ohio Supreme Court to "be in exact accord with justice and sound reason": Defiance Water Co. *v.* Olinger, 32 L. R. A. 736, but in the same sentence they admit, that as negligence was alleged, the doctrine so expressed "does not concern us at this time." Then why express it? This is an unwise and very mischievous habit. It is as much as most judges are able to do, to lay down the law applicable to the case in hand, without going outside, and such excursions are especially reprehensible when they applaud a doctrine that has been received with so little favor as that in question.

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The Green Bag.

PUBLISHED MONTHLY, AT $4.00 PER ANNUM. SINGLE NUMBERS, 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor,
HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

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

THE GREEN BAG.

WITH this number THE GREEN BAG completes its eighth year. It has made an enviable name and a place for itself in legal literature, and is now the recognized exponent of the "entertaining" and lighter phases of the law. That the lines on which the magazine has been conducted are satisfactory to our readers is evidenced by the loyalty of our subscribers and their pleasant words of commendation. For the future, then, THE GREEN BAG will follow the same general plan as in the past, but we can promise our readers that for the coming year it will be more interesting than ever. In addition to our regular contributors, a number of prominent writers have promised articles, which we are sure will attract much attention. The illustrated articles and biographical sketches will be of unusual interest, and our fund of anecdote and facetiæ is by no means exhausted. In fact, we are loaded up to the muzzle with good things.

THIS number of THE GREEN BAG will go into the hands of nearly every practicing lawyer in the United States. We bespeak for it a careful examination by those who are not familiar with it, and trust that they will show their appreciation of its merits by at once subscribing for it.

LEGAL ANTIQUITIES.

FEW people are aware that in two countries at least laws have been passed giving women the right to propose marriage. In case of refusal to accept the hand of the suitor a heavy fine was imposed upon the unfortunate man. Among the ancient records of Scotland a searcher has recently discovered an act of Scottish parliament, passed in the year 1288, which reads as follows: "It is statut and ordaint that during the rein of his maist blissit Begeste, ilk for the yeare knowne as lepe yeare, ilk mayden ladye of bothe highe and lowe estait shall hae liberte to bespeke ye man she likes, albeit he refuses to taik hir to be his lawful wyfe, he shall be mulcted in ye sum ane dundis or less, as his estat may be; except and awis gif he can make it appeare that he is betrothit ane ither woman he then shall be free." A few years later a similar law was passed in France and received the approval of the king. It is also said that before Columbus sailed on his famous voyage a similar privilege was granted to the maidens of Genoa and Florence. There is no record of any fines imposed under the Scotch law or trace of statistics of the number of spinsters who took advantage of it or the French enactment.

FACETIÆ.

"HE'S a great criminal lawyer, isn't he?" "Well, I believe he always stops short of actual criminality."

"CAN'T tell anything about the case yet," said the lawyer, "the jury is hung."

"Jerusalem!" exclaimed the prisoner, "that does beat all! But I knowed my friends 'ud lynch 'em if they got a chance at 'em!"

JUDGE CAMPBELL tells a story about the cross-examination of a bad-tempered female in his court. She was an amazonian person. Her husband, obviously the weaker vessel, sat sheepishly listening. The opposing attorney pressed a certain question rather urgently, and she said angrily: "You needn't think to catch me. You tried that once before." The lawyer said, "Madame, I have not the slightest desire to catch you, and your husband looks as if he was sorry he did."

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In making a motion for the postponement of a case, the attorney suggested that a certain date be fixed; unless, he added, "Your Honor will be full on that day." "I shall not be," answered the Court in a dignified tone; "I'm never full; you'll always find me sober." "What I meant to say, Your Honor," interrupted the attorney, "was, unless the Calendar will be full."

Years ago, while a court in one of our southern states was engaged in a criminal trial, the prisoner managed to elude the attention of his guard, and by slipping out of a window that was handy, actually effected his escape. Colonel R. being asked what he thought of it, squirted out the usual quantity of tobacco-juice, and remarked, "He acquitted himself well."

NOTES.

The Green Bag has recently published several articles on the jury system. A recent trial in Massachusetts illustrates the uncertainty of its decisions. A lady brought a suit against the estate of a wealthy man, claiming the payment of notes to a large amount which she said had been given her by the deceased. She was not a relative, but was closely connected with him by marriage, had been maintained by his generosity, and had been provided for in his will. The deceased had been a careful, close, business man, and no good reason could be assigned why he should have given these notes to the plaintiff, and the general verdict of the community was against her claim. There were three disagreements by juries. At the last of these, one of the jurors stated to the writer, that in their action on the case, the votes had been all the way from eleven in favor of the plaintiff to eleven against her. One of the jurors was from the same town, and stated to his fellow-members that under no circumstances would he decide against her.

The English judges live long. Lord Esher is eighty; Mr. Baron Pollock, seventy-two; and Justices Lindley, Lopes, Chitty, Wills, North, and Mathew are all over sixty-five. The aggregate ages of sixteen of the judges is 1,127, or an average of 70.

Counsel for the defendant, arguing for one who had been found guilty of murder in an affray resulting from the refusal of the deceased either to apologize or to fight a duel (Cavanah *v.* State, 56 Miss. 303, 1879): "No attractive civilization can exist without the presence of a courageous manhood disciplined by the teachings of the Christian era. Sow the State down in the salt of humility and submission demanded by the verdict in this cause, and no green thing of her former proud civilization will remain. Instead of standing upon the pyramid of her sunlit history, kindling into enthusiasm the patriotism and love of her children, we shall behold her become unfit for the conditions of peace or war, and among her sister States wearing the robe of a pitiable social and political emasculation."

An English custom of not so long ago was to hang smugglers on gibbets arranged along the coasts, and then tar the bodies that they might be preserved a long while, as a warning to other culprits. As late as 1822 three men thus varnished could have been seen hanging before Dover castle, says the Pittsburgh *Dispatch.* Sometimes the process was extended to robbers, assassins, incendiaries and other criminals. John Painter, who fired the dockyard at Portsmouth, was first hanged and then tarred in 1776. From time to time he was given a fresh coat of varnish, and thus was made to last nearly 14 years. The weird custom did not stop smuggling or other crime, but no doubt it worked some influence as a preventive.

The law students of Potsdam, N.Y., have organized a club for the purpose of preparing themselves for the bar examinations next year. The organization was perfected at a meeting recently held in the law offices of Hon. John G. McIntyre. It was decided to call the organization The Green Bag Club, not only because of the traditions clustering about the green bag itself, but in recognition of the publication of that name with which the members have become familiar while students in various university law schools. The club holds semi-weekly meetings. The members of the bar have kindly consented to quiz the members of the club and to address them on various legal subjects each week during the winter.

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BOOK NOTICES.

LAW.

A TREATISE ON THE LAW OF PERSONAL PROPERTY. By JAMES SCHOULER, LL. D. *Third Edition.* Little, Brown & Co., Boston, 1896. Two volumes. Law sheep. $12.00.

While this work is well known to the legal profession, the practitioner will find in this third edition many important additions which greatly enhance the value of the treatise. The entire work has been personally revised by the author. Volume I treats of the Nature and General Incidents of Personal Property; the Leading Classes of Personal Property. Volume II, of Title by Acquisition, Gift, and Sale. Mr. Schouler is one of the most satisfactory of our law writers, and his work is always thorough, exhaustive, and throughly reliable. One turns to his books with the certainty that they are something more than mere digests of the law. We heartily endorse this work on Personal Property, and commend it to our readers.

THE AMERICAN DIGEST. (Annual, 1896.) West Publishing Co., St. Paul, 1896. Law sheep. $8.00 *net.*

"Good wine needs no bush," and the American Digest needs no words of praise from us. It is so well known and appreciated by the profession that it is sufficient to merely announce the appearance of another volume. And what a volume it is! Nearly thirty-two hundred pages! If our judicial mills keep on grinding at such a rate, we shall have to have a two- or three-volume digest every year.

MEDICAL JURISPRUDENCE, FORENSIC MEDICINE AND TOXICOLOGY. By R. A. WITTHAUS, A.M., M.D., and TRACY C. BECKER, A.B., LL.B., and a staff of collaborators. In four royal octavo volumes. Volume IV, Toxicology. William Wood & Co., New York, 1896.

The fourth volume of this excellent work is devoted entirely to toxicology and the action and detection of drugs and poisons. The volume is the unaided work of Dr. Witthaus, and the experience of a lifetime in this, his particular field of research, is herein embodied. For breadth of scope, carefulness, wealth of detail, and depth of erudition, the present treatise is pre-eminent, while the author's exceptional opportunities in this line of work have left their impress in the thoroughly practical method adopted. The work, as a whole, is a very valuable addition to medico-legal literature.

THE LAW OF VOLUNTARY ASSIGNMENTS, for the Benefit of Creditors, under the New York Statutes. Brought down to date, with American and English decisions. By RUSSELL HEADLEY. With a complete set of forms by BENJAMIN MCCLUNG. Matthew Bender, Albany, N.Y., 1896. Law sheep. $3.00.

New York lawyers will appreciate the value of this work, and will find it of much assistance. It is thorough and complete, and apparently covers every point likely to arise.

HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS. By WALTER C. TIFFANY. West Publishing Co., St. Paul, 1896. Law sheep. $3.75.

This latest issue in the "Hornbook Series" follows the same general plan as that adopted in the previous books of the Series. A concise statement of the law precedes each subdivision of the subject, and is followed and illustrated by a fuller treatment in the subsidiary text. Mr. Tiffany seems to have gone over the ground very thoroughly, and students will find the treatise a safe guide upon the subject.

THE LAW OF HORSES, including the Law of Innkeepers, Veterinary Surgeons, etc., and of Hunting, Racing, Wagers, and Gaming. By GEORGE HENRY HEWITT OLIPHANT. *Fifth Edition.* By CLEMENT ELPHINSTONE LLOYD, B.A., of the Inner Temple. Sweet & Maxwell, London, Eng., 1896. Cloth. $6.30.

This treatise furnishes in a convenient form the law of contracts regarding horses in all their various legal aspects. While "horse cases" do not, perhaps, play as prominent a part as formerly in our American courts, still they are sufficiently frequent to make a work like this of interest to practitioners.

HANDBOOK OF THE LAW OF TORTS. By WILLIAM B. HALE, LL.B. West Publishing Co., St. Paul, 1896. Law sheep. $3.75.

This work is practically an abridgment of Mr. Jaggard's two-volume treatise upon the subject. The abridgment has been principally effected by the omission of merely cumulative citations and illustrations from text and note. In its present form it supplies the demand for a single-volume work on Torts.

MISCELLANEOUS.

A YEAR IN THE FIELDS. Selections from the Writings of JOHN BURROUGHS; with illustrations from photographs by CLIFTON JOHNSON. Houghton, Mifflin & Co., Boston and New York, 1896. Cloth.

For the lover of nature and out-door life the works of Mr. Burroughs possess an indescribable charm.

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His walks and talks are all so real that the reader feels as if he were himself sharing them. Healthier or more inspiring reading could not possibly be found than these papers, which have been carefully selected from Mr. Burrough's writings. The illustrations, which are artistic gems, represent many of the familiar haunts of the author, and serve to bring the reader into closer companionship with him.

LAZY TOURS IN SPAIN AND ELSEWHERE. By LOUISE CHANDLER MOULTON. Roberts Brothers, Boston, 1896. Cloth.

Anyone who follows the author in her rambles through Spain, Italy, France and Switzerland, will have a most delightful time. She went for pleasure, and surely she obtained it, and the recital of her wanderings is very entertainingly and graphically told. The book is not a guide-book by any means, but is a chatty description of a pleasant journey. We commend it to our readers.

POEMS OF JOHANNA AMBROSIUS. Translated by MARY J. SAFFORD. Roberts Brothers, Boston, 1896. Cloth. $1.50.

Johanna Ambrosius is one of the wonders of the nineteenth century. Born the daughter of a poor artisan, wedded to a peasant, and accustomed to the hard labor required in the house and field, she has at once stepped into the foremost rank of Germany's poets. Her verse breathes German life in every line, and, as a critic has said, "rings like those old folk-songs, religious hymns, and lullabies that form so large a part of German literature." The translator's work is admirably done.

MOTHER, BABY AND NURSERY. By GENEVIEVE TUCKER. A manual for mothers. Fully illustrated. Roberts Brothers, Boston, 1896. Cloth. $1.50.

This is an excellent work for teaching mothers how to properly bring up young children. It furnishes a practical summary of the infant's hygiene and physical development, and will certainly do much to relieve the worry and anxieties of young mothers.

THE STORY OF AARON (so-called), the Son of Ben Ali. Told by his friends and acquaintances. By JOEL CHANDLER HARRIS. Illustrated by OLIVER HERFORD. Houghton, Mifflin & Co., Boston and New York, 1896. Cloth.

The little ones will hail with delight this new book by Mr. Harris. Their old acquaintances, Buster John, Sweetest Susan, and Drusilla, again appear, and are treated to stories of the most entertaining description by various animals. For a Christmas gift for boys or girls, the "Story of Aaron" is just the thing.

THE LETTERS OF VICTOR HUGO to his family, to Sainte-Beuve, and others. Edited by PAUL MEURICE. Houghton, Mifflin & Co., Boston and New York, 1896. Cloth.

These letters cover the period of the author's life extending from 1815 to 1835. They are written in those short, incisive sentences which distinguish the great novelist's works, and give a most interesting insight into the character of the man. Tenderness and an almost childlike simplicity mark even the later letters, and, judged by them, Victor Hugo must have been a most lovable person.

THE COUNTRY OF THE POINTED FIRS. By SARAH ORNE JEWETT. Houghton, Mifflin & Co., Boston and New York, 1896. Cloth. $1.25.

Miss Jewett always writes most entertainingly of New England life and character, and this story of a summer in a village on the coast of Maine is in every way delightful. We commend it to those in search of something worth reading.

CHAPTERS FROM A LIFE. By ELIZABETH STUART PHELPS. Illustrated. Houghton, Mifflin & Co., Boston and New York, 1896. Cloth. $1.50.

In a most charming manner, Mrs. Ward takes the reader fully into her confidence and unfolds many interesting episodes of her by no means uneventful life. The book, however, is not devoted wholly to herself, but choice bits of information and anecdotes of other well known writers are given. The illustrations are a feature of the work, and include scenes in Andover and Gloucester, and also a number of portraits.

MARM LISA. By KATE DOUGLAS WIGGIN. Houghton, Mifflin & Co., Boston and New York, 1896. Cloth. $1.00.

Many as are the good things Mrs. Wiggin has written, "Marm Lisa" may be set down as the very best production of her pen. Humor and pathos are skillfully blended, and Mrs. Grubb, Mistress Mary, and Marm Lisa are characters drawn by a master hand.

BARKER'S LUCK, and Other Stories. By BRET HARTE. Houghton, Mifflin & Co., Boston and New York, 1896. Cloth. $1.25.

Eight short stories, written in Bret Harte's inimitable manner, form the contents of this volume. Each one is well worth reading, and a more agreeable book to while away a leisure hour it would be difficult to find. The contents include, beside the title story, "A Yellow Dog," "A Mother of Eve," "Bulger's Reputation," "In the Tules," "A Convent of the Mission," "The Indiscretion of El'sbeth," and "The Devotion of Enriquez."

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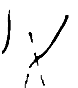

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